[redacted]

Supreme Court of the United States

[redacted]

No. [redacted]

[redacted]

[redacted]

[redacted]

(32,952)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF COUNSEL.

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719–2d Avenue, Seattle, Washington.

JOHN T. CASEY, Esquire, Attorney for Plaintiff in Error,
531 Lyon Building, Seattle, Washington.

THOMAS P. REVELLE, Esquire, Attorney for Defendant in Error,
310 Federal Building, Seattle Washington.

PAUL D. COLES, Esquire, Attorney for Defendant in Error,
303 Federal Building, Seattle, Washington.

[1*]

United States District Court, Western District of Washington, Northern Division,

November, 1925, Term.

No. 10,392.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THOMAS J. CASEY,
Defendant.

---

*Page-number appearing at the foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Act of December 17, 1914, as Amended.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oath present: [2]

COUNT I.

That THOMAS J. CASEY, on the 31st day of December, in the year of our Lord one thousand nine hundred twenty-five, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously, and not in the original stamped package, nor from the original stamped package, purchase from a person whose name is to the grand jurors unknown a quantity, to wit, three and four-tenths (3.4) grains of a certain compound, manufacture, salt, derivative, and preparation of opium to wit: morphine, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That THOMAS J. CASEY, on the 31st day of December, in the year of our Lord one thousand nine hundred twenty-five, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away a certain compound, manufacture, salt derivative, and preparation of opium, to wit: morphine, without having registered and paid the special tax as required and imposed by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
ARTHUR E. SIMON,
Assistant United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, Feb. 24, 1926. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [4]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant Thomas J. Casey is guilty as charged in Count I of the indictment herein; and further find the defendant Thomas J. Casey is guilty as charged in Count II of the indictment herein.

DAVID C. McKEE,
Foreman.

[Endorsed]: Filed Jun. 10, 1926. [5]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

May Term, 1926.

And now after verdict against the defendant and before sentence, comes said defendant in his own proper person and by his attorneys of record, and moves the Court herein, to arrest the judgment and not pronounce judgment or sentence, for the following reasons, to wit:

a. Because Count I in the indictment does not state sufficient facts to constitute a crime under the laws of the United States.

b. Because Count II in the indictment does not state or charge facts sufficient to constitute a crime under the laws of the United States, and a verdict thereon would not bar further prosecution.

c. That the indictment as a whole was procured by false testimony and does not charge a crime under the laws of the United States, and a verdict thereon would not bar further prosecution.

d. That physical facts show conclusively that the defendant could not and did not commit the crime alleged, or attempted to be alleged, in the indictment.

e. That the Government failed to prove the defendant's guilt beyond a reasonable doubt or at all.

f. That improper evidence was admitted at the trial and which was prejudicial to defendant.

This motion is made and based on the record herein, and because of the errors in the record no lawful judgment or sentence can be rendered or passed by the Court upon such record, and this motion will be called up for hearing at 10 o'clock A. M., or as soon thereafter as counsel can be heard before Hon. Edward E. Cushman, Judge, and prior to judgment or sentence on the 3d day of July, 1926.

JOHN T. CASEY,
JAY C. ALLEN,
JOHN T. CASEY,
Defendant's Attorneys.

Due service of the foregoing motion admitted June 30, 1926.

THOS. P. REVELLE,
Plaintiff's Attorneys.
B.E.M.

[Endorsed]: Filed Jun. 30, 1926. [6]

[Title of Court and Cause.]

HEARING ON MOTION IN ARREST OF JUDGMENT.

Motion for New Trial—For Sentence on Verdict of Guilty, Both Counts.

Now, on this 3d day of July, 1926, this cause comes on for hearing on motions in arrest of judgment and new trial. Oral argument is had on motions in arrest of judgment and new trial. Motion in arrest of judgment is denied with exception allowed. The Government is allowed one week to file controverting affidavits. Defendant is allowed one week to file reply affidavits. Defendant to file written brief July 24, Government answering brief Aug. 3d. Defendant reply brief August 10. Sentence is passed at this time.

Journal No. 14, at page 562. [7]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant above named, Thomas J. Casey, and by his attorneys of record, moves the Court to vacate and set aside the verdict returned herein on the 10 day of June, 1926, and to grant defendant a new trial, and for reasons therefor shows to the Court the following:

a. The verdict is contrary to the law of the case.

b. The verdict is not supported by any credible evidence in the case, and is contrary to such evidence, and was based on false testimony.

c. The Court admitted incompetent evidence at the trial offered by the United States.

d. The Court excluded competent evidence at the trial offered by the defendant.

e. The Court improperly instructed the jury to defendant's prejudice.

f. The Court improperly refused, to defendant's prejudice, to give correct instructions requested by defendant.

g. Misconduct of the jury.

h. The Court erred in refusing to direct a verdict of not guilty on both counts at the close of the Government's case.

i. The Court erred in refusing to direct a verdict of not guilty on both counts as requested by defendant at the close of all the evidence.

j. Newly discovered evidence material for the defendant and which could not have been discovered and produced at the trial by reasonable diligence.

k. Misconduct of the prosecution and accident and surprise to defendant which ordinary prudence could not have guarded against.

This motion is made and based on the records and files herein, on evidence taken at the trial and on affidavits to be served and filed in support of

this motion, and will be called up for hearing on July 3, 1926, at 10 A. M.

JOHN T. CASEY.
JAY C. ALLEN,
JOHN T. CASEY,
Defendant's Attorneys.

Due service of the foregoing motion admitted June 30, 1926.

THOS. P. REVELLE,
Plaintiff's Attorney.
B.E.M.

[Endorsed]: Filed Jun. 30, 1926. [8]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL (SUPPLEMENTAL).

The defendant Thomas J. Casey, individually, and through his attorneys of record, petitions the Court to vacate and set aside the verdict returned herein on the 10 day of June, A. D. 1926, and to grant said defendant a new trial on the following grounds and for the following reasons, to wit:

1. Irregularity in the proceedings of the Court, jury and the plaintiff whereby defendant was prevented from having a fair trial.
2. Misconduct of the jury and of the plaintiff.
3. Accident and surprise which ordinary prudence could not have guarded against.
4. Newly discovered evidence which is material

for defendant and which reasonable diligence could not have discovered and produced at the trial.

5. Insufficiency of the evidence to justify the verdict, in this: That there was no evidence whatever, credible or otherwise, that defendant purchased 3.4 grains of morphine as alleged in the first count of the indictment, or any other amount, at Seattle, or in the northern Division of the Western District of Washington and within the jurisdiction of this court. Nor if any was purchased that it was not in or from the original stamped packages.

That there was no evidence whatever, credible or otherwise, that the defendant did manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away any blank amount of morphine within the jurisdiction of this court, and without having registered or paid the special tax required and imposed by law on such blank amount of morphine, as alleged in Count II of the indictment, or otherwise or at all.

6. Error in law occurring at the trial and excepted to at the time by defendant, in this: (a) That witnesses were allowed to testify for the Government in a general way from imagination rather than from fact, about the actions and doings of people who never were defendant's clients, and over whom he had no control, and with whom he never had any dealings. That such testimony was most insidious, deceptive, and prejudicial to defendant.

(b) Error in failing and refusing to instruct the *the* jury to return a verdict of not guilty in favor of defendant on Count I.

(c) Error in failing and refusing to instruct the jury to return a verdict of not guilty in favor of defendant on Count II.

(d) Error in failing and refusing to instruct the jury that there was no credible evidence in the case against defendant upon which a verdict of guilty could be based.

This motion is made and based on the records and files herein, on the evidence taken at the trial, and on affidavits herewith served and filed, and this motion will be presented prior to sentence.

JAY C. ALLEN.
JOHN T. CASEY.
JAY C. ALLEN,
JOHN T. CASEY,
Defendant's Attorneys.

Due service received July 3, 1926.

PAUL D. COLES,
Asst. U. S. Attorney.

[Endorsed]: Filed Feb. 26, 1927. [9]

[Title of Court and Cause.]

SENTENCE.

Comes now on this 3d day of July, 1926, the said defendant, Thomas J. Casey, into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of

record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. "Wherefore, by reason of the law and the premises, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of violating the Act of December 17, 1914, as Amended and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County Washington, or in such other prison as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the period of 14 months at hard labor on each of Counts I and II, terms to run concurrently and not consecutively, and to pay taxable costs. And the said defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution."

Judgment and Decree, Vol. 5, at page 260. [10]

[Title of Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL.

Motion for New Trial Denied.

(Order Extending Time for Lodging Bill of Exceptions.)

Now on this 20th day of September, 1926, all parties being present in court, the Court announces from the bench that affidavits as to newly discovered evidence not of character to justify new

trial. Affidavits impeaching witness Nelson not in point on motion for new trial. Other affidavits as filed fully considered. Motion for new trial is denied with exception allowed.

Fourteen days are allowed to file bill of exceptions and present bail is enlarged for 14 days from this date.

Journal No. 14, at page 616. [11]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Hon. E. E. CUSHMAN, Judge of the Above-entitled Court:

The petition of Thomas J. Casey, by Jay C. Allen and John T. Casey, his attorneys, respectfully shows that on the 3d day of July, 1926, the United States District Court for the Western District of Washington, Northern Division, gave judgment against your petitioner in the above-entitled cause, wherein, as appears from the face of the record of the proceedings therein, certain errors were committed which are more fully set forth in the assignments of error presented herewith,—

NOW, THEREFORE, to the end that said matters may be reviewed and said errors corrected by the Circuit Court of Appeals for the Ninth Circuit, your petitioner prays for the allowance of a writ of error and such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable Jus-

tices of the Circuit Court of Appeals for the Ninth Circuit for review and correction; and that an order be made staying and suspending all further proceedings herein pending the determination of said writ of error by said Circuit Court of Appeals.

JAY C. ALLEN,
JOHN T. CASEY,
Attorneys for Petitioner.

[Endorsed]: Filed Sep. 28, 1926. [12]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant and makes the following assignment of errors:

The District Court erred as follows:

1. In permitting the witness Allen J. Stark to testify: "That the majority of defendant's clients were narcotics," and that "After defendant's visits to the county jail his clients were under the influence of narcotics." With other similar testimony, and denying defendant's motion to strike such testimony out.

2. In permitting said witness Stark with other witnesses to testify concerning the installation of a dictaphone in the county jail.

3. In permitting said witness Stark to testify that, "Addicts ordinarily take the shot with a needle," and other similar testimony.

4. In permitting the witness George Cicero and other witnesses to testify that, "Defendant visited

said Cicero on December 19, 1925," and on prior occasions, and then conversed about, "An order for $25.00 which Cicero gave to defendant and asked defendant to send him some junk, meaning morphine," and in testifying that, "Some morphine came to the county jail saturated in a pair of white socks the following Sunday," for the reason that such testimony was prejudicial and was irrelevant to the charges in the indictment. [13]

5. In permitting Cicero and other witnesses to testify concerning any conversation that defendant had with such witness, regarding narcotic drugs and, "I told him he could send it in saturated in a bath towel or laundry of some sort."

6. In permitting Geral V. Close to testify that defendant said to Cicero, "How do you feel?" That Cicero replied, "Pretty bad, can you fix me up?" That Casey said, "I haven't anything with me. Have you any money?" "Yes, I have $20.00. Will you send me up some morphine? You can send it up in the laundry." To which defendant said, "Yes, I will, give me the order for the $20.00, on the ground that such testimony was prejudicial to defendant, and was irrelevant and immaterial to the specific charges made in the indictment, and was given over defendants objection.

7. In permitting any evidence of conversations or acts in the county jail on December 31, 1925, over defendant's objection as not proving or tending to prove any charge in the indictment.

8. In admitting over defendant's objection Exhibit 4 as incompetent, irrelevant and immaterial.

In admitting Exhibit 5 on the same grounds. In admitting Exhibit 6 on the same grounds. In admitting Exhibit 7 objected to on the same grounds. In admitting Exhibit 8 objected to on the same grounds. In admitting Exhibit 9 objected to on the same grounds.

9. In allowing the witness Frances Nelson to testify that Roy Nelson her brother-in-law said to her, concerning defendant, "This is the man that supplies all of us boys with narcotics whenever we want it," for the reason that such testimony was prejudicial and did not prove or tend to prove either charge of the indictment. [14]

10. In allowing the witness Robert J. Hawkins to testify, "That on December 18 or 19, 1925, I delivered some laundry to a prisoner by the name of Wilson. Wilson took his laundry in his mouth and fell over on his bunk, and began to suck on one of those socks," over defendant's objection as immaterial, as such testimony did not prove or tend to prove the specific charges in the indictment and was prejudicial to defendant.

11. In instructing the jury, "That if it has been shown by evidence convincing you beyond a reasonable doubt that this towel with the morphine in it was in the possession of the defendant, that evidence is prima facie evidence of his guilt," on the grounds that said instruction assumes that morphine was in the towel.

12. In instructing the jury, "If defendant had registered, or paid the tax he must have shown it, and you will assure that he had not registered

or paid the tax," on the ground that such instruction places the burden on defendant of showing his innocence.

13. In refusing to instruct the jury to find the defendant not guilty on count I of the indictment.

14. In refusing to instruct the jury to find the defendant not guilty on count 2 of the indictment.

15. In denying defendant's motion in arrest of judgment.

16. In pronouncing judgment and sentence upon the defendant.

17. In denying defendant's motion for a new trial.

WHEREFORE, plaintiff in error, prays that the judgment of said District Court be reversed and this cause remanded thereto with instructions to dismiss the same and discharge plaintiff in error and exonerate his sureties and for such other and further relief as seems proper to the Court.

JAY C. ALLEN,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.

Due service of the foregoing assignment of errors admitted this 29 day of September, 1926.

PAUL D. COLES,
Attorneys for Defendant in Error.

[Endorsed]: Filed Sep. 28, 1926. [15]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

Upon motion of Jay C. Allen and John T. Casey, attorneys for the above-named defendant, and upon filing a petition for a writ of error and an assignment of errors as required by law,—

IT IS HEREBY ORDERED, that a writ of error be and hereby is allowed to have reviewed in the Honorable United States Circuit Court of Appeals of the United States for the Ninth Circuit the judgment entered herein on July 3, 1926, and it is further ordered that the amount of defendant's bond on said writ of error is hereby fixed at the sum of $5,000.00 to be given by said defendant, and on giving of such bond by two sufficient sureties, or the same sureties as were heretofore approved by the Court Commissioner, that the judgment heretofore rendered together with all proceedings thereon on disbarment and otherwise be superseded and stayed pending the hearing of said cause in the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, the above order is granted and allowed the 29th day of September, 1926.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Sep. 29, 1926. [16]

[Title of Court and Cause.]

BAIL BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That I, Thomas J. Casey, of the County of King, State of Washington, as principal, and Catherine Tracy and Thomas W. Tracy, Ella B. Traynor, Thomas J. Traynor, B. A. Brady, Grace Brady, as sureties, are held and firmly bound under the United States of America in the full and just sum of Five Thousand ($5,000.00) Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and signed this 29 day of September, 1926.

WHEREAS, lately on the 3d day of July, 1926, in *the entitled* court in the above-entitled cause pending in said court, a judgment and sentence was rendered against the defendant, Thomas J. Casey, and this said defendant obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said District Court to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said court thirty days from and after the date thereof, which citation has heretofore been served. [17]

Now the condition of said obligation is such that if the said Thomas J. Casey shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument or when required by law or rule of said court and from day to day thereafter in said court until said cause shall be finally disposed of and shall abide and pay the judgment and all orders made by said Court of Appeals in said cause and shall surrender himself in execution of the judgment and sentence appealed from, as said court may direct if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the Western District of Washington, Northern Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said court provided the judgment and sentence against him shall be reversed by the United States Circuit Court, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

B. A. BRADY.
GRACE BRADY.
THOMAS W. TRACY.
CATHERINE TRACY.
THOMAS J. CASEY.
T. J. TRAYNOR.
ELLA B. TRAYNOR.

Approved as to surety, Sept. 30, 1926.
[Seal] A. C. BOWMAN,
U. S. Commissioner. [18]

JUSTIFICATION OF FIRST SURETY.

United States of America,
Western District of Washington,
Northern Division,—ss.

Catherine Tracy, a surety on the annexed recognizance, being duly sworn, deposes and says that —he resides at 734 N. 34th Ave., in the City of Seattle, Wn., in said District; that —he is a freeholder in the City of Seattle, Wn., and that —he is worth the sum of Five Thousand ($5,000.00) Dollars, over and above all *his* just debts and liabilities, in property subject to execution and sale, and that *his* property consists of Lots 17 and 18, block 2 Quilter's Addition to Seattle, Wn. Assessed value, $2,180.00. Separate property.

(Affiant's Signature) CATHERINE TRACY.

Sworn to and subscribed before me, this 30th day of September, A. D. 1926.

[Seal] A. C. BOWMAN,
United States Commissioner as Aforesaid. [19]

JUSTIFICATION OF FIRST SURETY.

United States of America,
Western District of Washington,
Northern Division,—ss.

Thos. J. Traynor and Ella B. Traynor, his wife, a surety on the annexed recognizance, being duly sworn, deposes and says that *he* resides at 1811 E. Spring St., in the City of Seattle, Wn., in said District, that *he* is a freeholder in the County of Snohomish, Wn., that *he* is worth the sum of Three

Thousand ($3,000.00) Dollars, over and above all *his* just debts and liabilities, in property subject to execution and sale, and that *his* property consists of N. E. ¼ N. E. ¼ Sec. 22, Tp. 27 N., R. 10 E., W. W., Snohomish County, Washington. (Containing million and a half of merchantable timber.)

(Affiant's Signature) T. J. TRAYNOR.
ELLA B. TRAYNOR.

Sworn to and subscribed before me, this 30th day of Sept., A. D. 1926.

[Seal] A. C. BOWMAN,
United States Commissioner as Aforesaid.

JUSTIFICATION OF SECOND SURETY.

United States of America,
Northern Division,—ss.
Western District of Washington,

Bernard A. Brady and Grace Brady, his wife, surety on the annexed recognizance, being duly sworn, deposes and says that *he* resides at 925 15th Ave., in the City of Seattle, Wn., in said District; that *he* is a freeholder in the City of Seattle, Wn.; that *he* is worth the sum of Five Thousand ($5,000.00) Dollars, over and above all *his* just debts and liabilities, in property subject to execution and sale, and that his property consists of S. 41 feet of the east 85 feet of lot 8, block 18 Edes and Knight's Supp. to Seattle, Wn. And Tract 167, Division 3 of Garden of Eden Addition, King Co., Wn. Assessed value, $2,180.00.

(Affiant's Signature) BERNARD A. BRADY.
GRACE BRADY.

Sworn to and subscribed before me, this 30th day of Sept., A. D. 1926.

[Seal] A. C. BOWMAN,
United States Commissioner as Aforesaid.

[Endorsed]: Filed Oct. 1, 1926. [20]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 26, 1926, TO PREPARE AND FILE BILL OF EXCEPTIONS.

Upon application of the defendant, and it appearing to the Court that good cause exists therefor, it is,

ORDERED that the time in which a bill of exceptions may be prepared and filed heerin is hereby extended to the 26th day of July, 1926.

Done and ordered in open court this 18th day of June, 1926.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Jun. 18, 1926. [21]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 26, 1926, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY ORDERED that the time for lodging in this court and presenting the bill of

exceptions in the above case be extended and continued until the 26th day of August, 1926.

Done in Esterbrook, Wyoming, this the 26th day of July, 1926.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Jul. 29, 1926. [22]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 27, 1926, TO FILE BILL OF EXCEPTIONS.

For cause shown, the time in which the defendant shall prepare and lodge in this court a bill of exceptions is hereby extended to Sept. 27th, 1926.

Done and ordered at Esterbrook, Wyo., this 24th day of August, 1926.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed Aug. 30, 1926. [23]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on June 3, 1926, this cause came on for trial before Hon. Edward E. Cushman, District Judge; plain-

(Testimony of Allen J. Stark.)

tiff appearing by Thos. P. Revelle, U. S. Attorney, and defendant being present in person and by Jay C. Allen and John T. Casey, his attorneys.

WHEREUPON the following proceedings were had and testimony taken:

TESTIMONY OF ALLEN J. STARK, FOR PLAINTIFF.

ALLEN J. STARK, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLES.)

I was a deputy sheriff, jailer and superintendent of King County Jail in December, 1925. I know the defendant and have seen him visit prisoners in the King County Jail, and that most of his clients visited were narcotics,—the majority of them. That after the defendant visited some of these narcotic prisoners in the King County Jail, I had noticed that the same prisoners were under the influence of narcotics.

Mr. ALLEN.—The same is objected to, and I move to strike the answer as leading.

The COURT.—Objection is overruled and motion denied.

The COURT.—The last objection is that there is no competency [24—1] shown on the part of the witness to pass judgment on whether a person shows indication of being under the influence of narcotics. On that ground I would sustain the objection unless you qualify the witness.

(Testimony of Allen J. Stark.)

Examination.

I have been a jailer for about ten years. During my ten years' experience as jailer I have had much to do with narcotic prisoners, both under the influence of narcotics and those who were not, and from my experience, I have noticed that when addicts are placed in the institution and are cut off from the drug, they become sick, in fact, real sick, and are not able to do anything, and they lay around and sleep. After they get a little shot they brighten up and are different persons altogether, and that after Mr. Casey had visited some of these narcotic defendants in the King County Jail, I noticed that these same prisoners were under the influence of narcotics.

On December 29, I gave Mr. Patterson and Close permission to install a dictaphone in the attorney's cage. This is a little cage containing about six seats. We put the prisoners in there and allow the attorneys to come in there and talk and converse with them. I saw the dictaphone after it was installed, the receivers of which were in the light room adjoining the attorney's cage. Mr. Patterson and Mr. Close were at the jail on December 30, and deposited $20.00 to the credit of the prisoner Cicero. They were also there on December 31 about ten o'clock. They went back to the light room when Mr. Casey arrived (Tr., line 1, p. 7). Mr. Casey came in and asked to see George Cicero. He was allowed to see him, and after he had conversed with him for some time, came out with an order for $20 Cicero had given him, and we gave

(Testimony of Allen J. Stark.)

him the money. He then asked to see Roy Nelson, who, at the time was visiting with his sister-in-law, Mrs. Nelson. The defendant then asked to see Roy in the attorney's cage separate from the sister-in-law and we put him in there and they conversed for some time. After they had been there for a while, I went out to the end of the corridor and in a few minutes Roy and Mr. Casey came into the office and made out an order for $75.00 of Nelson's money. I knew Nelson did not have $75.00 and told Casey so. [25—2] Nelson was so sick that he could hardly stand up. I told Casey that I did not feel like paying him that much money, and he asked me how much I would want to pay out, and I said $50.00 ought to be enough, and he made the order for $50.00 and I paid it (Tr., p. 7).

IDENTIFICATION.

Government's Exhibit 1 is an order for $20 from George Cicero, upon which order I gave the money to Mr. Casey in Mr. Cicero's presence.

Government's Exhibit No. 2 is an order for $50.00 from Mr. Roy Nelson to Mr. Casey, and the money on these orders was given to Mr. Casey.

Mr. ALLEN.—When? I would like to know something about it. I object to the question as being too remote.

The COURT.—You will have to show who it was, or something to make it material.

Q. The Sunday previous to the arrest of Mr. Casey?

(Testimony of Allen J. Stark.)

A. I understand not the Sunday previous. I believe it was the 19th of December, 1925.

Q. Do you recall what prisoner that was directed to?

A. As a matter of fact I was not there when that came. I had instructed some—

Mr. ALLEN.—Never mind what you instructed somebody.

The COURT.—Objection sustained.

A. Coming directly from Mr. Casey. I really do not know of anything personally.

Q. Not that you know of personally?

A. No, sir.

Cross-examination.

(By Mr. ALLEN.)

WITNESS.—I have been superintendent there about ten years and have had a good many narcotic prisoners there. They are not furnished narcotics by the officers. The doctors may possibly do so, but we do not know anything about it. I do not know whether the addicts in jail are periodically furnished small doses of narcotics. I do not know what they are furnished. They are given something to make them sleep, at night, by the doctors but not by the jailer or officers. The doctors who administer this are Dr. Stanley, the State Doctor, and Dr. Don Palmer, [26—3] for the United States. They are largely given these treatments in the evening, but I really don't know whether

(Testimony of Allen J. Stark.)

it was narcotics or what it was. They have been given medicine at different times during the day.

I have phoned to Mr. Casey at the request of prisoners who were accused of crime other than narcotics, and he has been coming to the jail quite often for a good many years, and on this particular day I believe I phoned him and told him that a prisoner named Cicero wanted to see him. I knew that the dictaphone had been put in there, and I knew that he was coming up, and I knew that the officers were waiting there for him. They had told me what they had given the $20 to the prisoner Cicero for. They didn't tell me they were there to trap him. They were going to find out what he was doing and what the conversation was. I knew he was coming up and the officers were laying there for him. (12). Narcotic prisoners are not pacified or quieted down by promises of relief any more than any other patients.

The drugs are taken in different ways; they are ordinarily taken with a needle, but I never saw one of them taken. I have seen them lit up after they had been given narcotics, or had any in their possession, at times. I have found syringe guns on the prisoners and taken them away from them.

I have never searched any particular prisoner after Mr. Casey had visited them, but after Mr. Casey left I suspicioned he had given them narcotics. There would be other people visiting the jail about the same time, and also there would be numerous packages come up all day long. Mr. Casey was not the only lawyer who visited nar-

(Testimony of Allen J. Stark.)

cotic addicts. He has a very small percentage of the addict cases. I have no idea how many addict cases Mr. Casey has had. I could not tell how many he has had in the [27—4] last three years. There have been many hundreds of narcotic prisoners in the jail during that period. I know he has had more than five or six or ten, but I could not say how many. I really do not know, but I know he has had considerable.

Redirect Examination.

(By Mr. COLES.)

Before a person is put into a cell, he is generally given a complete search, and if they have narcotics or any instruments to administer narcotics, they are taken away. When the doctor treats patients or prisoners, I have no idea what he gives them. I do not know whether it is narcotics or something else. (18)

TESTIMONY OF GEORGE CICERO, FOR PLAINTIFF.

GEORGE CICERO, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I was in King County Jail around December 16, 1925. I have seen defendant Thomas J. Casey up there. I saw him about the 18th of 19th of December which was the Saturday and Sunday previous to his arrest. I had a conversation with him at that time. I told Mr. Casey that there was

(Testimony of George Cicero.)

a Government case coming up against me, but I did not want him as my attorney. I was going to plead guilty; and he said, "What do you want me for?" and I said, "You ought to know." He explained he did not want to change places with me. When he left I gave him an order for $25, that I had borrowed from another man in jail. Objected to as immaterial. Sustained, but he can tell what he told defendant. (21) I asked him to send me some junk, meaning morphine, and told him if he could not do it to get someone else, naming a party. He said he would if I would give him the money. The following Sunday the morphine came to the jail saturated in a pair of white socks. [28—5] I do not know who sent the laundry up. The laundry was delivered to another prisoner. I was in jail on the 29th of December, and sent a message for Mr. Casey to come and see me. I knew at that time there was $20 deposited to my credit in the jail. Mr. Casey came between ten and eleven o'clock on December 31. When he arrived I told him I was sick. This conversation took place in the attorney's cage. He was on the outside and I was in the cage. I told him that I was sick; that I did not feel well, and asked him if he had anything for me. He said he didn't have anything with him, and asked me if I had any money. I told him I had $20 in the office, and he said, "Are you sure," and I told him I was, and he left.

I asked him if he would send me some morphine, and he said he would if I would give him the $20.

(Testimony of George Cicero.)

I told him that he could send it in in a bath towel, or laundry of some sort; to buy some or go to my house and get some, and he said he would send it in.

I told him there was another prisoner in the tank by the name of Roy Nelson who had some money, and was sick and was in pretty bad shape, and wanted some narcotic drugs—morphine, and told Casey he had $140, and asked him if he would do something for Nelson, and he said he would see him. I saw him go into the office with Mr. Casey.

When I had the conversation with Mr. Casey, I told him to send the morphine in saturated in laundry, and he said he would. We then went into the jail office, and I signed an order for $20 and Mr. Stark gave him the money. I was then put back in the tank.

Q. "Did Mr. Casey come back to see you that day?" A. "Yes, sir." [29—6]

Mr. ALLEN.—That is leading.

The COURT.—Objection overruled.

WITNESS. — (Continuing.) Mr. Casey came back sometime after four; I do not know the exact time. Mr. Casey told me the stuff would be up that afternoon, any minute, and explained how it was *was* coming. He said it was coming saturated in towels, and was sure it would come through because it would not show. He did not say what sort of a towel it would be in; then he left.

At the time I had this conversation with Mr. Casey on December 31, I was not using narcotics. I had not used narcotics since the twelfth of De-

(Testimony of George Cicero.)

cember. I did not take the cure, but had not used any since the twelfth of December. At the present time I am absolutely cured from the use of narcotics.

Cross-examination. (25)

(By Mr. ALLEN.)

WITNESS.—I am not sure when I first met Mr. Casey. I do not know the exact date. It was quite a while before I was arrested. I had met him previous to the time that I was at the City Jail. My mother did not have him come to see me in the City Jail. In fact, he followed my mother all over town. I was in the City Jail accused of forgery—accused of forging prescriptions. I was once convicted of a felony—under the influence of narcotic drugs. I do not remember the date. I was arrested and accused of forgery on or about December 10 or 12. I did not send for Mr. Casey. He did not come to see me. He was not at the City Jail at all. I saw him in the jail office one day when I was visiting my mother. He did not come in with my mother, and I did not speak to him. Later I saw him in the County Jail, and gave him an order for $25.00. This order was signed by Charlie Wilson, and drawn on the superintendent of the jail. I do not remember the date. I asked him to send in some junk, and [30—7] it was sent in in socks. These socks were turned right over to Charlie Wilson. I did not get a bit of it. The next prisoner I called his attention to was Mr. Nel-

(Testimony of George Cicero.)

son. I sent a note out on the 29th through the jailer to have Mr. Casey come and see me. He came on the 31st. It was on that day that I told Mr. Casey, Roy Nelson wanted to see him; that he had $140. At that time I knew that $20 had been deposited to my credit in the jail by Mr. Patterson and Mr. Close, narcotic agents. That arrangement was made on December 29th or 30th. It was after I had asked Mr. Stark to call Mr. Casey. The narcotic officers asked me how the junk came in the other day—meaning the stuff that came in to Wilson, and I told them how it came in. I told them I knew about the $25.00 order, and I had given it to Casey; that it was Charlie Wilson's money. Then I told Mr. Patterson and Mr. Close just how it came in, and that it came in in socks, as I explained before. When the morphine would come in in towels, we would get it out by cutting in piece of towel off, and put water on it, and draw it up in a hypodermic syringe. I have been a user of narcotics for about four years, but I am not using it now, and have not used any since last December. I am painting now—contracting for myself under my own name.

Redirect Examination.

(By Mr COLES.)

I was accused of forging narcotic prescriptions, and have been convicted of the purchase of narcotics.

(Testimony of Gerald V. Close.)

Recross-examination.

(By Mr. ALLEN.)

I have not been tried on the forgery case, and it is still pending.

TESTIMONY OF GERALD V. CLOSE, FOR PLAINTIFF.

GERALD V. CLOSE, being duly sworn, testified: (37) [31—8]

Direct Examination.

(By Mr. COLES.)

I am a Federal narcotic officer, and have lived in Seattle about a year and a half. I know the defendant Thomas J. Casey. On December 29, with Mr. Patterson and an electrician from the Federal Building, I went to the County Jail, and with the permission of the Chief Jailer, installed a dictaphone in the attorney's cage, the receivers being put in a little room called the light room, which is right adjacent to the corner of the attorney's cage. The receiver of the dictaphone was under the seat in the attorney's cage. We bore some holes in the wall of the light room so we could see who was seated in the attorney's cage. We tested the machine out on the 29th and 30th. We waited until about 5 o'clock on the 29th, came back on the morning of the 30th and deposited $20 to the credit of George Cicero. We waited all day on the 30th, and then came back on the 31st. On the 31st of December we again tested the dictaphone, and had

(Testimony of Gerald V. Close.)

a jailer named Anderson listen over it. About 10:20 Mr. Casey came, and I went into the light room. I could see Mr. Casey take the chair and place it in the corridor, and I could see Mr. Cicero come in and sit down in the seat in the attorney's cage. I had one of the receivers of the dictaphone on one ear, and Patterson had the other receiver. We were about three feet away from Mr. Casey and Mr. Cicero. We could hear the conversation with both ears. I heard Mr. Casey say to Mr. Cicero, "How do you feel?" and Mr. Cicero replied, "Pretty bad," and asked Mr. Casey if he could fix him up, and Casey said, "I haven't a thing with me to-day." "Have you any money?" Cicero replied, "Yes, I have $20." Cicero said, "Will you send me up some morphine? You could send it up in the laundry?" and Casey said, "Yes, I will. Give me the order for the $20," and Mr. Cicero said, "Yes, I will give the order for the [32—9] $20." Cicero also said, "There is a man in there, Roy Nelson, who is sick in jail there, and he wants some morphine too. He has $140. Can you fix him up?" and Casey repeated, "$140," and Cicero said, "Yes, $140," and Casey said, "I will fix him up." Then Cicero said to Casey "Send my morphine up in the laundry to-day. You can go out to my house and get some towels or buy some." Mr. Casey said, "I will send the laundry out by messenger to-day." They then said, "Good-bye."

(Testimony of Gerald V. Close.)

In about approximately ten minutes Mr. Casey came back and interviewed a prisoner named Nelson, in the attorney's cage. Casey said to Nelson, "How are you?" and Nelson said, "I am pretty sick," and Mr. Casey said, "Who have you got for an attorney?" and Nelson replied, "Cadwalder." Mr. Casey then said, "How can you employ me if you have him," and Nelson said, "He is no good" he has only tried five or six narcotic cases. Then Mr. Casey said, "I am not knocking him, but you have him sized up about right." Mr. Casey said, "I can get you some morphine if you want me to," and then said to Nelson, "How much money have you got?" and Nelson said, $140." And Casey said, "Will you give me an order for $75?" At that moment Stark appeared there at the end of the corridor and told Casey that there was a woman waiting to see Nelson. Casey asked Nelson where his sister-in-law lived, and Nelson said, "4532 Orcas Street," and Mr. Casey repeated the number. Mr. Casey then said, "I will send your morphine up with George's this afternoon." They then said "Good-bye" to each other. After that we waited a while and returned to our office, and there the laundry containing the morphine was turned over to agent Patterson and myself by the agent in charge, Harry Williamson, and was taken to the City Chemist.

Mr. ALLEN.—I move to strike that there is no connection shown as to what laundry or anything of the kind. [33—10]

(Testimony of Gerald V. Close.)

The COURT.—The motion is denied.

WITNESS.—Then I accompanied agent Patterson to the District Attorney's office where a complaint and the necessary papers were made out to issue a warrant.

We obtained a search-warrant, and I went in company with agent in charge, Harry V. Williamson, and Inspector Engle, to Mr. Casey's office, and searched the office, and in the presence of Engle and myself, the agent in charge found some towels.

IDENTIFICATION.

Government's Exhibit 3, marked for identification, is a paper that was taken from the office of Mr. Casey, on which is written "Fred Nelson, 4534 Orcas Street." And at that time I initialed the paper.

Government's Exhibit 5, 6 and 7, are handkerchiefs which were found by narcotic agent in charge in my presence at Mr. Casey's office.

Government's Exhibit 8 is a pair of socks found by the narcotic agent in charge, at Mr. Casey's office.

Government's Exhibit 10 is the wrapper that was around the laundry that was turned over to agent Patterson and myself by the agent in charge.

Government's Exhibit 11 is a bath towel which was turned over by narcotic agent in charge to Patterson and myself, and taken to the City Chemist for analysis.

Government's Exhibit 12 is a bottle that Mr.

(Testimony of Gerald V. Close.)

Patterson and I received from the City Chemist, Jacobson, after we had turned the towel over to him to be analyzed.

Government's Exhibit 13 is another towel which was in the package of laundry.

Government's Exhibit 14 is the morphine extracted from the towel by City Chemist Jacobson. [34—11]

Government's Exhibit 15 is a towel taken from the package of laundry.

Government's Exhibit 16 are three handkerchiefs taken from the same laundry.

Cross-examination.

(By Mr. ALLEN.)

We were sitting three feet away from the defendant when he was talking with Cicero. They talked loud enough so I could hear them. Neither of them whispered. They used the word "morphine" two or three times. There were several holes in the thin partition about the size of a pencil, and I looked through and I could see Cicero. These handkerchiefs, referring to Government's Exhibit 16 were found in the package containing narcotics.

As to the conversation I heard between Casey and Cicero, it would not have been necessary to have the dictaphone to hear it.

Q. And in the conversation, apparently, as far as you could judge, there was no effort made by either Mr. Casey or Mr. Cicero, or Mr. Casey or Mr. Nelson, to lower the voice, or to speak privately or secretly?

(Testimony of Gerald V. Close.)

A. The conversation was in the normal tone of voice right straight along.

In the conversation between Nelson and Casey there was nothing said about fees. Casey asked for money to buy morphine with. Nothing was mentioned about $500. Nelson didn't ask Casey anything about what he would charge him. Casey asked him how much money he had after he had suggested to him he would bring him up some morphine. Nelson did not know we were listening to his conversation. Cicero knew. But nothing was suggested to him as to what he (Cicero) should say, or where he should sit in the cage, and nothing was said to Cicero about the tone of voice he should use in discussing the matter. We did not tell Cicero the purpose for wanting to hear the conversation between him and Casey. It was perfectly obvious to him, but to my knowledge he was not told anything about it. He knew we were there to [35—12] catch Casey for smuggling stuff into the jail.

When we searched Casey's office at No. 213 Melhorn Building, we did not find any narcotics or any trace of them. We did find some towels. I didn't see any wash-bowl and basin, but would not say there wasn't any. I saw no iron, or ironing board. We made a thorough search. It was approximately eight o'clock in the evening. The socks and handkerchiefs we found in the office were examined and nothing was found in them.

TESTIMONY OF DR. F. E. DENT, FOR PLAINTIFF.

Dr. F. E. DENT, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I am a physician and surgeon, licensed to practice in the State of Washington. In my experience and practice as a physician I have treated narcotic addicts for about four years. I examined the witness George Cicero about nine o'clock this morning and in my opinion state that, at the present time, Cicero is not using narcotics. The marks on his arm are not new.

Cross-examination.

(By Mr. ALLEN.)

Morphine can be taken in the mouth as well as by injection. From my practice and experience, I find that users of narcotics are not very truthful. They are very unreliable when using the drug.

Redirect Examination.

(By Mr. COLES.)

When a person stops using narcotics, he is not any more untruthful than anyone else. [36—13]

Recross-examination.

(By Mr. ALLEN.)

When a person is a narcotic user, they will lie

(Testimony of Mrs. Frances Nelson.)

to get it. Physicians sometimes prescribe small doses of opiates to addicts as reduction treatment.

TESTIMONY OF MRS. FRANCES NELSON, FOR PLAINTIFF.

Mrs. FRANCES NELSON, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I have lived in Seattle eleven years. I am married. I am the sister-in-law of Roy Nelson, a prisoner in King County Jail. I was visiting him on December 31, 1925; while I was talking to him, Mr. Casey came around there and said he wanted to see Roy Nelson; said he was a lawyer. I said, "My brother-in-law already has a lawyer," and he said he wanted to see him for a few minutes. I then waited while my brother-in-law talked with Mr. Casey, and when they came out together, I said, "Roy, what does this gentleman want?" and he said, "He wants $100." When I asked him what he wanted $100 for he said, "This is the man that supplies all us boys with narcotics whenever we want it," and he said, "I gave him an order." Then Mr. Casey gave me his card, and said he would see me on the outside. I made arrangements with Mr. Casey to go to his office after leaving the jail, and then I went to see the lawyer I had employed for my brother-in-law. From there I went up to see Mr. Williamson at the narcotic office, and then I went to Mr.

(Testimony of Mrs. Frances Nelson.)

Casey's office. When I arrived at his office the outside door was shut, and I knocked and the door was opened, and he asked me about my brother-in-law. I asked him what he could do for my brother-in-law, and he asked me if I could get $500 to supply, to keep my [37—14] brother-in-law going. I took good notice of the office, and it consisted of clothes and things like that hung up, and the wash-bowl. After we talked he asked me how much it would take to quiet my brother-in-law and I said it would take quite a lot, and he said, "I am sure this will do this time, and I will take more to-morrow," and I took the bundle and left there and brought it back to the narcotic office. I saw in Mr. Casey's offices an ironing board, and some clothes and some packages, and also saw an iron.

IDENTIFICATION.

Government Exhibit 10 is the paper that the bundle was wrapped in, when I took it to the Narcotic office.

Government Exhibits 13, 15 and 11 are all towels that were in the bundle of laundry.

Government Exhibit 16 was also in the package of laundry.

I had a conversation with the defendant; he told me that he had had seventeen narcotic cases, and out of that number he had won about fourteen. He told me that he supplied them with narcotics any time they wanted it; no matter what they wanted, he always got it to them.

(Testimony of Mrs. Frances Nelson.)

Q. "Did he make any statement on that day, at that place in the office as to how long he had been supplying the prisoners?

A. "What was that statement"?

Mr. ALLEN.—I object to that as incompetent, irrelevant and immaterial.

He said he had been furnishing them for the last seven or eight months; he also stated that day in his office that he had other deliveries to make and he didn't have time to make this one himself, and after he gave me the package I took it back up to the narcotic office. Mr. Hoffman and Mr. Ballaine were [38—15] present, and they opened it.

Cross-examination.

(By Mr. ALLEN.)

I have lived in Seattle eleven years. My husband is a longshoreman. I have not been married before and I am a sister-in-law to Roy Nelson. I don't know how long he has been an addict. I have been his sister-in-law for four years, and he has been an addict a part of that time. I have never used narcotics myself, nor have I ever got any for him. When I was up visiting Roy, I asked him (referring to Casey) who he was; he was standing next to me, and Roy told me he had given him $75. He said he wanted $100. I told Casey we already had a lawyer. I asked Roy what he gave it to him for, and he said, "This is the man who supplies us boys with narcotics," and we talked in an ordinary tone of voice, just as I am now.

(Testimony of Mrs. Frances Nelson.)

Mr. Casey waited for me outside. I went to Casey's office about 2:30—could not get in; went back again about fifteen or twenty minutes later. There was nobody waiting to get in his office the first time. When I came back the second time I saw a Japanese or Chinaman in the office. I did not see anybody else in there. I did not see any lady there. I was the only lady there. I had no package at all in my hand when I went back to his office the second time. When Mr. Casey gave me the package it was not torn. He wrote on the package in pencil when he handed it to me, "Roy Nelson, King County Jail." He said he could not take the package up because he did not want to be implicated in taking it to the County Jail. I told him I would take it. From Mr. Casey's office I went to the Narcotic office. Roy never lived in Ballard. I never lived there.

TESTIMONY OF ROBERT J. HAWKINS, FOR PLAINTIFF.

ROBERT J. HAWKINS, being duly sworn, testified: [39—16]

Direct Examination.

(By Mr. COLES.)

My name is Robert J. Hawkins. I live at No. 1820 Jackson Street in the city of Seattle. I have lived here for 22 years. I was in the King County Jail in 1925 on a misdemeanor charge. While I was in jail I was a trusty. I went in on the 14th

(Testimony of Robert J. Hawkins.)

day of November, and was there sixty days, and during that time I saw the defendant Mr. Casey several times. On the 18th or 19th of September, which was Sunday, I believe, laundry was given to me to deliver to a prisoner; that was a part of my duties. Any time anything came in, I was called and I would give it to the person it was for. On December 18 or 19, a package of laundry was given to me to be given to a prisoner named Wilson, and I delivered the laundry to him.

Q. What did Wilson do after he got the laundry.

Mr. ALLEN.—I object to that as immaterial, unless Mr. Casey was there.

The COURT.—The objection is overruled. You are not asked to detail what Wilson said, but what he did.

A. He took this laundry into his mouth and fell over on his bunk and began to suck on one of these socks. At first he did not find what he was looking for.

Mr. ALLEN.—I object to that as stating his conclusion.

The COURT.—Sustained.

Q. What did he do.

A. He fell over on his bed and was sucking on this sock when I walked away.

I was in King County Jail in the same capacity on December 31, 1925, and in the afternoon, around four o'clock or such matter, I saw Mr. Casey. At that time I had a conversation with [40—17] him in which he asked me if I was the head trusty,

(Testimony of Robert J. Hawkins.)

and I said "Yes." He said, "It is your duty to deliver packages and such as that that comes to the boys?" and I said, "Yes." He said, "Do they get everything that is sent up to them?" and I said "As far as I know they do." He wanted to know if there had been any laundry or clothing brought up that day to Cicero or Nelson, and I told him I hadn't delivered any. That was about the length of our conversation. I didn't see him talk with Cicero.

Cross-examination.

(By Mr. ALLEN.)

I live at 1820 Jackson Street. I have been a painter for the last six years, working practically for myself. On the 15th of November I entered the King County Jail to serve out a 60-day sentence for a misdemeanor. I was there about three days when I was made head trusty. I didn't deliver packages to the prisoners without their going through the jailer's hands. The jailer opened and examined them all. It was against the rules to deliver any package to anybody, even an envelope, without the jailer seeing it. It was against the rules for a lawyer or anyone else to deliver to the prisoners anything without the jailer's consent and knowledge. They have a large sign up in the jail publishing that fact, and the fact that if anyone did that would be forbidden the use of the jail or the right to come to the jail. All I know about this is that on the 18th or 19th of December

(Testimony of Robert J. Hawkins.)

a package came through for Wilson. I had nothing to do with it at all after the jailer had got through with it. They push a button and call me and I deliver the package after they have examined it. The jailer called me to his office, and said, "Take this package to Wilson." [41—18] I took it to Wilson, and Wilson grabbed it and commenced to suck or chew on one of the socks. On the 31st day of December, Mr. Casey came there later in the afternoon, around four o'clock, maybe later. He asked if I had taken anything in to Roy Nelson or George Cicero. He found out from me that if any package was delivered it would come through my hands, and he asked me if a package had been delivered for Nelson or Cicero. I told him I had not delivered any, and he went away. I did not see the party who delivered to the jail the package I took in to Wilson on the 18th or 19th of December, and I do not know who it came from.

TESTIMONY OF J. A. ANDERSON, FOR PLAINTIFF.

J. A. ANDERSON, being first duly sworn testified:

Direct Examination.

(By Mr. COLES.)

I have lived in Seattle about eight years, and I am a jailer in the King County Jail, and was there in December, 1925. I saw Mr. Patterson and Mr. Close in the King County Jail on the morning of

(Testimony of J. A. Anderson.)

the 30th when I came to work about nine o'clock. I saw Mr. Patterson and Mr. Close in the jail on the 31st day of December, and I saw a dictaphone which they had installed in the light room of the jail. The transmitter was in the first little stall next the light room. I listened over the dictaphone and could hear very plainly anything that was said over it, even a whisper. I went to the light room after they had installed this dictaphone and saw some holes in the partition. I saw a crack and some little holes which I looked through. I could see anything in the little stall next to it. I was on duty on the 31st of December when [42—19] Mr. Casey arrived, and I let him in. Before I did so I told him to wait a minute. Mr. Patterson and Mr. Close were in the office and I went in and told Mr. Stark that Mr. Casey was at the door, and he said, "Wait a minute." He put Mr. Patterson and Mr. Close in this little light room and locked them in. I stayed next the office. I saw Cicero going back and forth and Casey was talking with him in the attorney's cage; they were the only ones in the attorney's cage at the time. After Mr. Casey talked to Cicero he came out and got an order for $20.00 in my presence. I saw Mr. Stark give him the $20. After he got the money he wanted to see Roy Nelson who was visiting his sister-in-law at the time. I got Nelson out of the visiting cage and put him in the attorney's cage, and Mr. Casey had a talk with him for a short time. When they were through Mr. Casey came

(Testimony of J. A. Anderson.)

out, and he had an order for $75. Mr. Stark told Mr. Casey that the boy did not have that much money, and he did not think the boy knew what he was doing, so he made an order out for $50 and turned it over to Mr. Casey in my presence. Mr. Casey then left. I saw Mr. Casey again at about four o'clock in the afternoon.

Cross-examination.

(By Mr. ALLEN.)

The receivers of the dictaphone were placed in the light cage, and the transmitter was in the attorney's cage. You could hear the conversation perfectly, even without the dictaphone. I could see Cicero and Nelson when they were in the cage talking to Casey. I was just outside the little court leading into the joiler's room from the end of the attorney's cage. I was 25 feet away from them. I did not hear any of the conversation. [43—20] When Mrs. Nelson and Roy were talking I was walking up and down the corridor, sometimes seven or eight feet from them. I was attending to my duties. It was visiting day, and there were quite a number of visitors there, and I did not hear any of the conversation which took place between Mr. Casey, Roy and Mrs. Nelson. Shortly after the conversation with Roy and Mrs. Nelson, Mr. Casey left.

TESTIMONY OF C. M. HOFFLAN, FOR PLAINTIFF.

C. M. HOFFLAN, being first sworn, testified:

Direct Examination.

(By Mr. COLES.)

I am a Federal Narcotic Agent, and I was in the Post Office Building in December 31, 19 and 25 in the P. M. I saw Mrs. Nelson there that afternoon. I talked with her for a while and she went away and was gone for some time. Some time later she came back with a parcel of laundry and turned it over to Inspector Ballaine and myself.

Government Exhibit 10 is a piece of paper that this parcel was wrapped in.

Government Exhibit 11 is one of the towels in this package which we tested for morphine and turned over to Mr. Williamson.

Government Exhibit 12 is a bottle containing the solution that we took from the towel of Government Exhibit 11.

Cross-examination.

(By Mr. ALLEN.)

I identify these exhibits by the marks that were put on them at the time we took them out of the parcel of laundry. This was done in the office before we turned them over to Mr. Williamson. We got the package directly from Mrs. Nelson. We were [44—21] in Mr. Williamson's office.

(Testimony of C. M. Hofflan.)

Mr. Ballaine is a chemist, and he made the test that I spoke of. We made a test of just one towel, Exhibit 11. There were three towels and two or three handkerchiefs in this laundry package. That is all I remember being in that package. There was a name written on the wrapper in pencil. The name was "Roy Nelson," King County Jail. I do not know who wrote in green ink on the package, "F. B. Nelson 1:45 o'clock, December 31, 1925." W. J. P. are Patterson's initials; N. V. W. are Williamson's initials, and H. W. B. are Ballaine's initials. I do not know whether I put mine on there or not. I am sure that this package was delivered to me by Mrs. Nelson. Other than what Mrs. Nelson told me I have no personal knowledge of where the package came from.

TESTIMONY OF H. W. BALLAINE, FOR PLAINTIFF.

H. W. BALLAINE, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I am a Federal Narcotic Inspector, and have been since October 29, 1921. I am a graduate chemist and a licensed pharmacist.

Government Exhibits 13, 15, 16 and 11 all came from the package of laundry delivered by Mrs. Nelson.

Government's Exhibit 11 is a towel from which we made an acqua solution and tested it.

Government's Exhibit 12 is a bottle containing

(Testimony of H. W. Ballaine.)

the acqua solution—morphine sulphate. We did not make a quantitative test, just a qualitative; that was the only article in the laundry that we tested. After making this test we turned the package over to Mr. Williamson. [45—22]

Cross-examination.

(By Mr. ALLEN.)

I marked the towel. When the package was opened I examined the towels; they were dry and warm. It reminded me of laundry that had just come from the laundry after it has been ironed and was warm, and I wet the towel and wrung it out. Other than what someone told me, I have no personal knowledge where the package came from.

TESTIMONY OF L. A. ENGLE, FOR PLAINTIFF.

L. A. ENGLE, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I am a Federal Narcotic Inspector and I have been such for two years. On the 31st day of December, I accompanied Agent Harry V. Williamson and J. V. Close to Casey's office, which is Room 213, Melhorn Building, and there in the presence of Close and myself, I saw Williamson pick up some socks and some handkerchiefs and a newspaper off a table.

(Testimony of L. A. Engle.)

Government's Exhibits 4 and 9 are towels that were found in Mr. Casey's office.

Cross-examination.

(By Mr. ALLEN.)

We had a search-warrant. It was about eight o'clock in the evening, or a little later, on the 31st day of December. We were searching primarily for narcotics, but we did not find any. The handkerchiefs which were found there, which I have identified, had a monogram "N" in each corner. I have no knowledge of anything there but what I saw in the office.

TESTIMONY OF OLGA EVANSON, FOR PLAINTIFF.

Miss OLGA EVANSON, being duly sworn, testified: [46—23]

Direct Examination.

(By Mr. COLES.)

I am a clerk in the office of Narcotic Agent in Charge Harry V. Williamson. I have been there for two years. I know the defendant Thomas Jefferson Casey and have seen him come to the office. On the 31st day of December, 1925, I saw Mr. Casey coming out of the Rhodes' five and ten cent store. It was about noon. I fixed that particular time by the fact that on December 31 I was on my vacation, and I came down to sign my pay voucher as it was pay day.

(Testimony of Olga Evanson.)

Cross-examination.

(By Mr. ALLEN.)

No one had asked me to watch to see if I would see Mr. Casey. I did not make a memorandum of the fact, but it was again called to my mind when I returned to the office January 2. I do not remember what kind of clothes he was wearing when I saw him.

TESTIMONY OF R. T. REESE, FOR PLAINTIFF.

R. T. REESE, being first duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I have lived in Seattle five years. I am buyer for Rhodes Bros. 10-cent store, and was in December, 1925. Government's Exhibits 9 and 11 are towels identical to those we have in our store. These towels are not as common as an ordinary white towel, and we have some of the identical towels in our store at the present time. The towels in our store which are identical to these exhibits which you have handed me were bought in the latter part of November, or first part of December. [47—24]

Cross-examination.

(By Mr. ALLEN.)

We bought them from the Western Wholesale Dry Goods Company; they did not manufacture them for us; they are stock towels.

(Testimony of Walter James Patterson.)

I would not say that they had not sold the same kind of towels to other department stores.

TESTIMONY OF WALTER JAMES PATTERSON, FOR PLAINTIFF.

WALTER JAMES PATTERSON, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I have been a Federal narcotic agent for several years; three years of that time in Seattle. I know the defendant Thomas Jefferson Casey, and have talked with him at the office and other places. On the 29th of December I installed a dictaphone in the King County Jail. It was installed in the little room adjacent to the attorney's cage, and the receivers were put in this little room. On December 30th Agent Close and myself deposited $20 to the credit of George Cicero. We concealed ourselves in the light room and waited; Mr. Casey came about 10:20 A. M. He first interviewed George Cicero, and asked him how he was feeling. Cicero asked Casey if he could fix him up. Casey said, "I haven't a thing with me," and Cicero said I have $20. And Cicero told Casey that he could get a towel and some socks and send them up to-day and soak them with morphine. Casey said, "I will." Then Cicero told Casey that there was a party named Nelson back there and that he wanted to get fixed up too, and that he had $140. Cicero

(Testimony of Walter James Patterson.)

asked Casey if he would fix him up, and Casey said he would. Then Casey said to Cicero, "I will send your stuff up in the laundry to-day by messenger." And they left. [48—25] About twenty minutes later, Casey returned to the attorney's cage, and interviewed a Roy Nelson. Casey asked Roy Nelson who his attorney was, and Nelson replied, "Attorney Cadwalder." (Further testimony by witness same as related by Agent Close. Bl. of Ex., p. 8.)

When we went back to the office, Agent in Charge Williamson turned over a bundle of laundry, and I took it to the City Chemist Mr. Jacobson, who made a test and said that the laundry contained morphine. After this test was made, we turned it back to Agent Williamson.

Deputy United States Marshal Smith and a newspaperman by the name of Chalcraft and myself went out to Casey's house and placed Mr. Casey under arrest. This was about eight o'clock in the evening. While we were driving down in the car, Mr. Casey stated to Chalcraft, "I admit that I went up and talked with them," and he said, "Lots of times I promise drug addicts stuff just to make them feel good."

Cross-examination.

(By Mr. ALLEN.)

There was never any ill feeling engendered between myself and Casey over the Gleason case. I recall the Gleason case. I had a talk with the de-

(Testimony of Walter James Patterson.)

fendant's brother at the Rehan Apartments. In the course of conversation his brother asked me if I knew the defendant Tom, and I said to him, "The attorney?" and he said, "Yes," and I said, "Yes, I do. He has quite a few narcotic cases." His brother then said, "He is no attorney—he is a crook." I suggested the installation of the dictaphone in the jail, and also deposited $20 to the credit of Cicero, and told him that when Mr. Casey came up, to order some stuff and I would give Cicero the money for it. [49—26]

I know that an addict will do almost anything to get morphine. The conversation between Casey and Cicero was loud enough so that we could hear it without a dictaphone. We were about three feet away from where they were talking. There was between Casey and Cicero while they were talking a screen of very fine mesh, so small that nothing could be passed through it. After we had arrested Mr. Casey at his home on the evening of December 31st, Mr. Casey in a conversation with Mr. Chalcraft said, "I will admit I was talking with Cicero and Nelson and I will admit I tell them fellows just to console them that I will get them morphine." On the way down to jail Mr. Casey wanted to see Agent in Charge Williamson to explain the matter. I told him he could see Williamson at the county jail.

TESTIMONY OF ALBERT JACOBSON, FOR PLAINTIFF.

ALBERT JACOBSON, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I am a chemist. I am a graduate of a qualified school of chemistry, and a licensed pharmacist in this state. I have been City Chemist for twenty-one years.

Government Exhibit 12 is a bottle, the contents of which I have analyzed and found it to contain three and four-tenths grains of morphine hydrochloride.

Government Exhibit 14 is a towel which I have examined for the presence of morphine hydrochloride by soaking an end of it with water, and then squeezing it, and the liquid from this towel contained .153 grains of morphine.

Government Exhibit 15 I also examined, and it contained only a trace of morphine. Agent Patterson turned these towels over to me. There was no morphine in any of the rest of the laundry that was turned over to me. [50—27]

TESTIMONY OF HARRY V. WILLIAMSON, FOR PLAINTIFF.

HARRY V. WILLIAMSON, being duly sworn, testified:

Direct Examination.

(By Mr. COLES.)

I am narcotic officer in charge. I have been a federal narcotic officer for eleven years. I was in my office on the afternoon of December 31st, but was not there when a package was brought up by Mrs. Nelson on that day. I arrived about five o'clock. Mr. Ballaine and Mr. Hoffman turned over a package to me which was wrapped in Government Exhibit 10. It was soaking wet. At the time I did not see the writing on it, and several days later when it was called to my attention I had to use a magnifying-glass to see it. The package has been in my possession at all times, except when it was turned over to the chemist for tests.

Government's Exhibit 12 contains an aqua solution which I tested and found contained morphine.

After the package was tested by the chemist it was returned to me by Mr. Patterson and Mr. Close, and has been in my possession ever since.

On the evening of December 31st, with a Federal search-warrant, I went to Mr. Casey's office where we found a newspaper, a sack containing a pair of socks, two bath towels, and three handker-

(Testimony of Harry Williamson.)

chiefs. They are Government's Exhibits 3, 8, 4, 5, 6, and 7.

Cross-examination.

(By Mr. ALLEN.)

Government's Exhibit 10 was wrapped around the laundry. The package was wet, having absorbed the moisture from the towel that Inspector Ballaine had put in water. F. B. Nelson—was written in green ink on the package when it was turned over [51—28] to me. I did not say that 1:45 was there, but that the green writing was there. No one has written anything on it since it has been in my possession with the exception of my initials, that is, Government Exhibit 10, the paper in which the laundry was wrapped. The pencil writing on the paper was "Roy Nelson, King County Jail" and was not called to my attention until after it was returned from the chemist. Mr. Patterson called my attention to it, and he told me that Mrs. Nelson had informed him that the defendant wrote those words in her presence. I have not had the writing examined by a writing expert. When we searched Mr. Casey's office, we found no narcotics.

(Here witness excused.)

At this time Government Exhibit 1, which was an order by Cicero for $20, was admitted by the Court.

Government Exhibit 2 is an order for $50, given by Nelson to the defendant, and was offered in evidence and admitted without objection.

(Testimony of A. P. Casey.)

Government Exhibit 3, a copy of a "P–I," was offered in evidence and admitted without objection.

Government Exhibits 4, a towel, and 5, 6 and 7, handkerchiefs, and Government Exhibit 8, a pair of socks, and Government Exhibit 9, a towel, all found in Mr. Casey's office were offered in evidence, and admitted, over objection.

Government Exhibits 10, 11, 12, 13, 14, 15, 16, and 17 were all offered and admitted in evidence without objection. [52—29]

(Government rests.)

DEFENDANT'S TESTIMONY.

TESTIMONY OF A. P. CASEY, FOR DEFENDANT.

A. P. CASEY, being duly sworn, testified:

That he was manager of the Rehan Apartments and was a brother of defendant. That he had a talk with W. J. Patterson in November, 1925. Patterson rented an apartment from the witness and made a deposit of $5.00. Later withdrew the deposit and had a long conversation with witness. Patterson asked him if he was a brother of Tom Casey. When witness said yes he was and said that Tom was crazy over baseball. Patterson then said yes that he is crazy over baseball and that is not the only thing he is crazy over, he is crazy on this good-fellow stuff. "He don't good-fellow Patterson any more; he double-crossed me and I will get him for

(Testimony of A. P. Casey.)

it." I was surprised when emotion flamed up in his face as he said that.

Objected to. Sustained.

His face from having just an ordinary look of neighbourly interest, became angry for a moment and just as quickly was gone. I never said to Mr. Patterson that Tom was a crook in any shape, manner or form.

I made a diagram of the defendant's office at 213 Melhorn Block, which is drawn to scale. (Diagram marked Exhibit "A–1.") The room is 17x12 feet. You can readily hear the tearing of a paper through that partition, the board walls seem to accentuate the sound rather than deaden it.

On the *reverside* of "A–1" I drew a diagram of the County Jail, which is also drawn to scale. A jailer is constantly at the door; lets *you upon* request, to whom you state your business. The door is covered by a steel mesh. Another attendant admits you through a door to the Jail Superintendent's office. Several attendants are there. A sliding door, likewise a steel bar can be released by electrical contact and across each is likewise a screen of this mesh. In the attorneys' corridor are compartments about 30 inches wide having a little screen partition. In front of this entire corridor is a steel wire screen having 26½ openings per square inch. (Exhibit "A–1" and "A–2" admitted in evidence.) [53—30]

(Testimony of A. P. Casey.)

Cross-examination.

There was no thought of crookedness in connection with Mr. Patterson's statement about Tom or in my statement. He said Tom Casey had double-crossed him and he would get him for it.

That conversation was brought forcibly to my mind when I read in the paper about Tom Casey being arrested. It then appeared a serious matter.

Redirect Examination.

I was in defendant's office just before Christmas last year. I never saw an ironing-board or an iron in his office at any time.

ARTHUR E. GRIFFIN, Superior Court Judge for eight years.

C. E. CLAYPOOL, Superior Court Judge for six years.

JOHN McQUADE, Capitalist.

THOMAS A. O'GORMAN, Salesman.

T. M. ROYCE, ALBERT D. MARTIN, FRANK F. RANDOLPH, Attorneys, testified:

That they had known defendant well for 15 to 20 years. That each of them knew his character for truth, honesty, and integrity, and for his being an upright, honorable, and law-abiding citizen, and each testified that his character was the best. That prior to the charge made in the indictment herein they never heard anyone speak ill of him in any way.

TESTIMONY OF ALBERT D. MARTIN, FOR DEFENDANT.

ALBERT D. MARTIN, further testified:

That he had been practicing law 26 years, and had defended a great many prisoners. That he had often visited the King County Jail for many years. That attorneys are not allowed to come in personal contact with the prisoners except in the jail office. That it would be impossible to give any packages to the prisoners, as the screen separating the attorneys from prisoners is so fine that you could not put a match through it.

TESTIMONY OF HANS JACOB HOFF, FOR DEFENDANT.

HANS JACOB HOFF, being duly sworn testified:

That he was 49 years old. That he was Chief Examiner of mail in the Postal Federal Censorship. Had worked for the Intelligence Division of the Army & Navy. I am a college graduate. Have an A. B. from Kansas, and studied a year in the Texas University and a year in the Missouri University. I had 2 years in the University of Berlin, Germany, and a Ph. D. Degree from an Illinois University since 1908.

My main work as an expert on handwriting came in connection with the war where I examined hun-

(Testimony of Hans Jacob Hoff.)

dreds of pieces, codes of all [54—31] kinds, and many important and unimportant documents.

I examined Exhibit 10 last Saturday at defendant's request. I also examined Exhibits 1 and 2.

Exhibits 1 and 2 were not written by the same person who wrote "Roy Nelson, King County Jail" on Exhibit 10. It is blurred more now than it was last Saturday, but it can be sufficiently seen to determine it.

Cross-examination.

Exhibits 1 and 2 were written by the same person. Our handwriting depends a good deal on the time of day, the condition of our mind and the condition of our stomach, etc.

TESTIMONY OF DAVID H. LEE, FOR DEFENDANT.

DAVID H. LEE, being duly sworn, testified:

I have lived in this city 25 years. I now live a mile and one-half north of the city limits at 85th Street. I own a lot of property at Lake City. I saw defendant on December 31st, 1925, at Morningside, just this side of the first crossing, the other side of the Williard Hotel, north of the City. It was about a quarter to 12 A. M. Defendant was with 2 or 3 other persons. They were driving north towards Lake City. I was coming into Seattle.

Cross-examination.

I am not a lawyer. Casey beat me in a lawsuit

(Testimony of David H. Lee.)

about fifteen years ago. I maybe have spoken to him three times since. I know it was a quarter to 12 because I come every day to the city on the 10:30 bus that passes my place. I missed the bus and walked down to the store to see if Mr. Sumner was going in, to ride with him. He had already gone in and I started on foot for the car line. I got down town at half-past 12. I had a date at 12 o'clock. I was a half hour late.

My attention was called to this when I saw in the papers next day about it. I saw the article in the "P–I," next day about Tom Casey being arrested.

TESTIMONY OF DR. GEORGE R. MARSHALL, FOR DEFENDANT.

Doctor GEORGE R. MARSHALL, being duly sworn testified:

I am a physician and surgeon for the past seven years. A [55—32] graduate from a Medical College, the University of Washington and the University of Craig, Omaha. I have treated addicts in the Seattle City Hospital in 1919–1920.

Government admits the witness is a qualified physician and surgeon.

I would say it is my personal opinion that addicts are unreliable. I do not believe that I would believe any of them.

Cross-examination.

If a sufficient amount of time had elapsed after

(Testimony of Leo Casey.)

they quit using the drug, say 5 to 10 years as a minimum, an addict might talk normal again.

TESTIMONY OF LEO CASEY, FOR DEFENDANT.

LEO CASEY, being duly sworn, testified:

I am a brother of the defendant. Ten brothers are living. I live at 310–21st Ave. North. Defendant came to my place about 10:30 A. M. on December 31st, 1925. I was associated with him from that time until 1:30 or 2:30 P. M.

We went from my place to 2933 Franklin Avenue and picked up a prospective buyer for some property at Lake City. It was Mr. Camp. We drove north and met Mr. Lee in the road between the old Bothwell Highway and the New Victory Way at Morningside.

Cross-examination.

Q. What did you mean about 10:30 A. M.?

A. A variation of 10 or 15 minutes either way. We were out there the day before New Year's Day to sell this property. My brother P. H. and Tom and 2 other gentlemen were with us. One was Mr. Camp, who wanted to see the property. We expected to sell the property at Lake City to him.

TESTIMONY OF LETHIA J. KNIGHT, FOR DEFENDANT.

LETHIA J. KNIGHT, being duly sworn, testified:

That her former husband, Dr. M. G. Young, died in 1917. I married my present husband, Mr. Knight, in 1923.

Dr. Young was the originator of Dr. Young's herb remedies and organized Dr. Young Herb Co. I learned the business and live at 736 North 73 Street, where I have a laboratory. I have had an [56—33] office at 213 Melhourn Bldg., since 1919. My office hours are between 2:05 P. M. I had a little partition put in so I could have a private room. It was made of plaster-board or something of that kind. I always keep towels in the office and use them for my patients. Different kinds of Turkish towels, I have had towels which look exactly like Exhibit 4. After Dr. Young died, Mr. Bents and myself handled the company for two years. Mr. Bents withdrew and I was obliged to take another partner to keep the Company alive. Mr. Casey was recommended to me as a good business man and I took him in and he took part of the stock. He was formerly in the New York Block until they tore it down.

I know defendant's habits. On several occassions I have seen his handkerchiefs in the drawers. One or 2 times a bundle of laundry was delivered

(Testimony of Lethia J. Knight.)

there from the laundry. Many times he would leave an old handkerchief and get a clean one.

I used the towels in giving hot and cold applications. I bought all the towels myself.

I remember when Mr. Casey was arrested. It was New Year's Eve. It was in the paper New Year's Day. I saw Mr. Casey 2 or 3 times the day before. I got to my office about 2 o'clock and saw Mr. Casey and Mrs. Traynor in the office. That was December 31st, 1925. Mrs. Traynor was waiting to see me, she sat in the outside office. Mr. Casey went in the inner office and Mrs. Traynor and I sat down to talk. While we were there a large fleshy lady came in to see Mr. Casey. She went directly into Mr. Casey's office; she had a package in her hand. It was kind of bulky and was wrapped up in light brown paper. Government's Exhibit 10 looks like the color of it. I could hear every word that was said. This lady said to Mr. Casey; "I am Roy Nelson's sister-in-law" or "I am Roy's sister-in-law, Mrs. Fred Nelson." She said, "I have a package here I should like to have you take up to the jail for Roy." Mr. Casey said, "I cannot do that, Mrs. Nelson, I am not going up to the jail this afternoon." [57—34] She said, "You promised to go up; you promised to get Roy some stuff. Are you not going to get it for him?" He said, "No, I am not going to get it; I had no intention of getting it. I said that to satisfy his mind and make him feel easy. I could not and would—get anything of the kind. She said, "Roy

(Testimony of Lethia J. Knight.)

is in a terrible shape, and he said, "If he is in that bad a shape get a doctor and he will relieve his condition." Mr. Casey said, "Under no consideration will I take it up." And she went out with the same package still in her possession.

After she left Mr. Casey said to Mrs. Traynor and myself, "What do you think of that? Isn't that a great proposition to make to anybody?"

Mr. COLE.—I object to that and ask that it be stricken.

The COURT.—It may be stricken.

Mr. ALLEN.—Noted an exception.

There was no ironing-board or iron in that office on December 31, 1925, there never was any there.

Mrs. Traynor, Mr. Casey and myself were the only persons in the office when Mrs. Nelson was there. There was no Japanese or Chinese in the office at any time.

Cross-examination.

I have lived in Seattle 29 years. I do not administer medicine. I sell the medicine and sometimes use hot towels when necessary. I use the office as much as Mr. Casey did. I kept a half dozen or a dozen towels, and often used them to put hot applications in case of severe pain for immediate relief only.

The lady that came into the office that time was Mrs. Nelson, whom I have seen here in the courtroom.

Mr. Casey told Mrs. Nelson that if Roy was feel-

(Testimony of Lethia J. Knight.)

ing so bad she should get a doctor for him, She said, "I have some stuff here in this package, but it is not enough." [58—35] He said he could not take it under any consideration.

Redirect Examination.

There are no electric plates or stoves or flat-irons or anything of that kind upon which you could warm an iron in that office.

TESTIMONY OF ELLA TRAYNOR, FOR DEFENDANT.

ELLA TRAYNOR, being duly sworn, testified:

I am past 50 and married. I am defendant's sister. I have lived in Seattle 22 years. My husband is a carpenter.

I had a growth on my chest and several Doctors told me I should have to undergo an operation. I went to consult Mrs. Knight on December 31st, 1925, and get herb medicine. I went about half-past 1 P. M. No one was in and I waited in the hall. While I was there a stout lady came and tried the door. That woman was Mrs. Nelson. I did not see her since, but have seen her here in the courtroom. Mr. Casey came first. I went in and sat down and waited for Mrs. Knight. After a few minutes she came. I was talking with Mrs. Knight when this stout lady appeared again. She went straight in to Mr. Casey's office and introduced herself to Mr. Casey as Mrs. Nelson. She said I am Mrs. Fred Nelson and I think she added

(Testimony of Ella Traynor.)

I am Roy's sister-in-law. She wanted to know if Mr. Casey would take this package to the jail when he was going up that afternoon. He said, "I am not going up this afternoon, Mrs. Nelson." She said, "Why you said you were going to see Roy this afternoon." And he said, "I have no intention of seeing Roy this afternoon." She said, "I have a package for you and I have some stuff in it and I want him to have it." He said, "I cannot take it up. I would not if I could." She said that if he would not take it up she would, and then she left. I think the package was partly unwrapped or torn. There was no one in the office while she was there except Mrs. Knight and Tom. There was no Japanese or Chinamen there. There was no iron or ironing-board there. I have been in the office several times and never saw such a thing.

Cross-examination. [59—36]

When Mrs. Nelson wanted Mr. Casey to take some stuff up to the jail and told about Roy Nelson being very sick Mr. Casey said, "You better get a doctor."

TESTIMONY OF A. A. KAMP, FOR DEFENDANT.

A. A. KAMP, being duly sworn, testified:

I am a builder and live at 2933 Franklin North. I have lived here 19 years. I had an engagement to go to Lake City on the Bothell highway to see some land with the Caseys. Tom Casey and his

(Testimony of A. A. Kamp.)

2 brothers went. It was about 11 o'clock. We returned about 1 or 2 o'clock. I read the morning's paper that Mr. Casey was arrested. I went down to his brother's office and he told me that Tom was arrested.

TESTIMONY OF P. H. CASEY, FOR DEFENDANT.

P. H. CASEY, being duly sworn, testified:

I am in the timber business. It was between Christmas and New Year's when Tom, Leo, and myself and Mr. Kamp went out to see some property that Mr. Lee had for sale. Tom was driving the car. We met Mr. Lee on the old Bothell highway. We reached Mr. Kamp's home between 11 or 11:30 A. M. We returned between 1 and 2 o'clock.

TESTIMONY OF THOMAS J. CASEY, IN HIS OWN BEHALF.

THOMAS J. CASEY, being duly sworn, testified:

I have lived in Seattle about 24 years and am 52 years old. I have a wife and little girl 8 years old. I am a lawyer and have practiced since January, 1903, general practice, no specialty. I have handled all kinds of criminal and civil cases.

Here defendant offered to mention several important cases in which he took part as attorney. An objection was sustained to this evidence. An exception allowed.

(Testimony of Thomas J. Casey.)

I had a case known as the Gleason case. W. J. Patterson arrested Lee Gleason and seized his automobile. I asked Patterson what disposition he was going to make of it and he would not give me any satisfaction. I asked him about the automobile once or twice and he said, "The automobile is not very valuable." I asked him if it was worth driving to Portland and he said, "I don't think so. I took the matter up with Mr. Williamson and said the [60—37] automobile ought to be returned to the wife. Later Patterson said he understood I was going to drop the matter and I told him I could not convey any title to the automobile. He said, "You put me in bad now. I have had a lot of trouble about this on your account. I understood you were not going to say any more about the automobile." I told Mr. Patterson that was not the position he should take, and he became incensed and angry with me and said I was a double-crosser. I resented the imputation and we said nothing more about it.

My office was in the New York Block about 17 years. When they dismantled the Building I moved to the Melhourn Building.

I have never bought, sold, gave away, or possessed a single grain of morphine or other opiate. I have never procured, or suggested to anyone else to procure morphine or narcotics of any kind.

I heard George Cicero's testimony about Wilson and never made any such a proposition at any time. I never sent or caused to be sent any narcotics to Wilson on the 18th or 19th of December,

(Testimony of Thomas J. Casey.)

1925, or at any other time. I had absolutely nothing to do with that the Trusty Hawkins testified about, and knew nothing about it. I never represented Wilson. Cicero gave me $25.00 as part of a fee. His mother first came to me in the City Building at 5th and Yesler. I was going to see another client. Cicero had been taking orders for Christmas trees and I helped the old lady, his mother, to get the orders at the City jail straightened out. She asked who I was, and I handed her my card. Later Cicero sent for me. I got a permit from the Marshal's office to see him. He was in jail for forging a doctor's certificate for morphine.

He said, "I haven't much money but I can get $100 for you. My mother has money and I have some money coming for Christmas trees." I said, "If you are short I can handle your matter, but lawyers have to live and money is always welcome." He sent for me later [61—38] and we had several conferences. He asked me at one time if I would get what he called "junk" or "dope." I put him off at the time but later he asked me again and I said, "Look here, you have been in trouble here. Do you expect me to do something that would make me change places with you? You know I cannot bring you any dope. I may have promised you but you know I never brought anything and never intend to. Why should you insist on my bringing you this stuff?"

On December 28 or 29th I received several calls to go to the jail. I did not go until the 31st.

(Testimony of Thomas J. Casey.)

Allen Stark then telephoned that Roy Nelson and George Cicero wanted me. I said I would be up after while. He said, "These fellows have been crying for you for two or three days." I went up about 10 o'clock. Cicero came out and sat behind the screen. I sat on the other side and conferred with him. He said he was awfully sick. I said, "I do not think you are as sick as you pretend to be." I noticed he walked spryly and was apparently feigning sickness. He asked if he could have some narcotics. I said, "You can have all you want, I guess, but I cannot bring you anything of that kind. Why do you insist on bringing this question up again?" He said he had $20.00. I said, "Have you really got $20.00?" He then spoke to me about Nelson and he came out to the office and and gave me an order for $20.00.

I asked to see Nelson. He said, "I am here," and his sister spoke up and said, "Who are you?" I said, "I am Attorney Casey." I then interviewed him in one of those places. His sister said that "Roy has an Attorney," and I asked if he wanted me to represent him. I could not see him inside the grating, but he said, "Yes," and went around to the jail office and we conferred at the attorney's stall. I said, "Your sister says you have an attorney; how are you going to employ two attorneys?" He made a disparaging remark about his sister and said he wanted me to represent him and asked me to see his sister. I then asked him for her address. [62—39] He said he had

(Testimony of Thomas J. Casey.)

a hundred or a hundred and fifty dollars. I told him the usual fee was $500.00. "You can give me a retainer of $75.00." He said, "All right, I will." I went into the jail office and wrote an order for $75.00. Stark said he was sick and did not have that much money and finally said he would pay an order for $50.00. Exhibit 2 is the order I wrote out. I handed Mrs. Nelson my card and said, "You can find me any time by appointment."

Roy begged of me to get him some morphine. I said, "You are pretty sick. You ought to have a doctor."

I went to my office and later went out of the city to look at some real estate with my brothers Leo and P. H. Casey. We met a Mr. Lee on the way out. I got back to my office about half-past one or two o'clock. Mrs. Traynor came first; later Mrs. Knight came. Later a lady came and announced herself as Mrs. Nelson. She said she wanted me to take a parcel to the County Jail. I told her I had not planned on going up that afternoon. She said, "You were going to see Roy, were you not?" and I said, "I cannot go this afternoon." She said, "You promised him you would go up and bring him some stuff." I said, "You know, Mrs. Nelson, if I made such a promise I had no means of fulfilling it. I would not think of doing that." She then tore the package open a little bit and said, "It is perfectly safe to take it up. You can take it up to him better than I could because you are an attorney." I said, "Don't talk that way to me. I will not have

(Testimony of Thomas J. Casey.)

anything to do with it. I do not know where I could get anything." I told her if Roy is sick like you say he is you should get a physician to look after him, but I cannot take any stuff to him. I never did and never would. I may sometimes make such promises in order to relieve the mental anguish or suffering of the patient. I do not handle any such stuff at all." She said, "I will take it to him myself."

I have seen Government's Exhibit 10 before. She tore the package. I did not write "Roy Nelson, King County Jail" or anything [63—40] else on the package with pencil or pen, in her presence or otherwise. It is not my handwriting. "F. B. Nelson 1:45 December 31, 1925," is not my handwriting.

There is not and never was an iron or ironing-board in my office.

I began to think that I should inquire further into her request for me to take the package to the County Jail. I went there and asked Cicero if a package was delivered to him or Nelson that afternoon. He said no. I also asked Hawkins and he said nothing had come up. No one told me there was any narcotics or morphine in the package except Mrs. Nelson, who told me there was a few grains in the package. She said it was not enough for him.

When I was home a Mr. Smith, Deputy Marshal, phoned and said a bootlegger from Black Diamond wanted to see me. I said if it is necessary for me to come down right away I will go. I was just

(Testimony of Thomas J. Casey.)

sitting down to dinner and said if he could wait until to-morrow I could see him. I live about seven miles out. About a half hour later Mr. Patterson came to my house. Smith said, "I have a warrant for you, Tom." I read it and saw it was based on Patterson's affidavit. I asked Patterson what this was all about. I told my wife I would be back in 2 or 3 hours. She did not know I was under arrest. On the way down I asked Patterson to bring me to Williamson's office. I said I was ready to tell everything and straighten the matter out. I have done nothing to go to jail for. Patterson would give me no information. He said, "You are going to the County Jail now. You are under $10,000 bond." I asked why such an enormous bond. Patterson told Jailer Barr not to let Casey talk to anybody. After he had gone I asked Barr to allow me to telephone my wife, but he refused. I gave bond about 3 o'clock next day.

I was never in any trouble and never accused of any crime prior to this. I never at any time sent any narcotics to the County jail and never was a party to sending any. I never purchased [64—41] in this district or elsewhere from any person, opium or 3.4 grains morphine or any other amount. I never manufactured or produced in this district or elsewhere and never dispensed, distributed, or administered any.

I never made any statement to Cicero that I would send him morphine in a towel or laundry. Cicero knows that I would not do that. There was

(Testimony of Thomas J. Casey.)

no such statement as my sending morphine to Cicero by laundry, by messenger or otherwise.

I had nothing to conceal. I talked in a normal tone of voice. The money that Nelson paid to me was absolutely a retainer fee and that was the only purpose I received it for.

Cross-examination.

If you want my movements in chronological order that day I will tell you. I first came from the jail to my office. Maybe it was 11 o'clock or after. I bought the handkerchiefs from Tvete at 3d and Marion. I went with my brother to Capitol Hill and out to see the property. I cannot fix the exact time but I know the "Times" whistle blew at 12 o'clock while we were on the property at Lake City. I think I returned about 1:30.

After I had been arrested, naturally I did not appear for Cicero.

I bought a half dozen of plain linen handkerchiefs from Mr. Tvete for $2.00.

There never was a Jap or Chinaman in my office.

Re*cross*-examination.

Cicero employed me as his attorney and he was paying me that money as a part of my fee that he agreed to pay me. Regarding Nelson he told me that he wanted me as his attorney at that time.

Regarding a change of collars and socks, I often went out in the timber with my brother P. H. and often came back soaked with my feet wet

(Testimony of Hans Jacob Hoff.)

and would change my socks there. The handkerchiefs which were found in my office were probably mine. [65—42]

TESTIMONY OF HANS JACOB HOFF, FOR DEFENDANT (RECALLED).

HANS JACOB HOFF was recalled and testified:

That the person who wrote "1:45 o'clock December 31, 1925," in green ink on Exhibit 10, was not the same person who wrote Exhibits 1 and 2.

TESTIMONY OF E. P. CHALCROFT, FOR DEFENDANT.

E. P. CHALCROFT, being duly sworn, testified:

That he was a Reporter on the "P–I." That he went with Patterson and Smith to Casey's home on December 31, 1925. That on the return trip Casey asked Patterson very earnestly to take him to the U. S. Commissioner so that he might give bond. He also asked to be taken to Mr. Williamson's office, and when he asked if he was being taken there Patterson said, "You are going to the County Jail." Casey said the next day was a holiday and he could not post bonds. He then asked to let him talk to Williamson or see the U. S. Commissioner, or Judge or anyone so that he could post bonds that evening.

(Testimony of E. P. Chalcroft.)

Cross-examination.

He first told me he knew nothing of why he was arrested. When I told him that the officers informed me that he had arranged to supply narcotics to Cicero and Nelson in the County jail, as I remember he then said, "Perhaps I did kid them along to let them down easy." That was about all that was said. He did say that it was usual for addicts to ask him for narcotics, but he denied that he had ever furnished any.

TESTIMONY OF D. C. BOWLES, FOR DEFENDANT.

D. C. BOWLES, being duly sworn, testified:

I have had charge for fourteen years of the Department which sells towels in the Western Dry Goods Co. We sell to merchants throughout the city. We buy from a dozen different mills. We have not sold or handled towels like Government Exhibits 4 and 9 for the last six years. We had no towels of that pattern in November and December, 1925. That being a fancy towel of a peculiar pattern, I know we do not handle it. [66—43]

TESTIMONY OF DR. A. P. CALHOUN, FOR DEFENDANT.

DR. A. P. CALHOUN, being duly sworn, testified:

I was born at 3rd and Jefferson in Seattle. I was superintendent of the Insane Hospital at Steil-

(Testimony of Dr. A. P. Calhoun.)

acoom for 8 years and 3 months. I have had the opportunity to observe the effects of morphine and those who use it. I have seen a large number of addicts.

At first it had an exhilarating effect. A pleasurable feeling. But when that wears off it is one of depression. When they get another dose they go up and then down again. This goes on until they become what we call chronic addicts. Their finer senses, the ethical senses, truth and veracity go first. They do not care what they do; they are careless about their appearance; they will lie to get the drug. They have a violent nerve reaction and even go to the point of collapse.

Promises of the drug is one of the methods of treating these cases. It is what we term as the withdrawal method. The promise tends to buoy them up, to hold over them the anticipation that they will get the drug.

Cross-examination.

Some addicts stand it very well and go all through life using morphine, and some will succumb in a few months or years. Some take 5 or 6 grains and some take 30 or 40 grains.

INSTRUCTIONS.

Defendant challenged the sufficiency of the evidence and requested the court to instruct the jury to return a verdict of Not Guilty on Count I of the Indictment.

Also requested the Court to instruct the jury to return a verdict of Not Guilty on Count II of the Indictment. [67—44]

After the jury returned its verdict and before judgment, defendant filed a written motion in arrest of judgment, and also motion for a new trial.

The motion in arrest of judgment was overruled July 3, 1926, and an exception allowed. Defendant also excepted to the judgment and sentence on July 3, 1926, which exception was allowed.

The defendant, in support of his motion for a new trial, served and filed the following affidavits:

AFFIDAVIT OF E. L. TVETE.

"E. L. TVETE, being first duly sworn, deposes and says: That he is the owner of a Men's Furnishing Store at 3rd and Marion, Seattle; that on December 31, 1925, the defendant Casey purchased six plain handkerchiefs from affiant; that the initial 'N' was not on any of said handkerchiefs as shown on Government exhibits 5, 6 and 7 herein; that affiant was subpoenaed as a Government witness but was not called upon when it was learned what affiant's testimony would be."

AFFIDAVIT OF C. L. STEVENS.

"C. L. Stevens, being duly sworn, deposes and says: That for several years he has been engaged in the grocery business at 5703 Rainier Avenue, Seattle, that he has known Mrs. Frances Nelson for two or three years, who now resides at 4534 Orcas St.; that he knew her when she lived in Ballard where she lived for nearly a year to affant's

knowledge; that she often visited affiant's store and affiant knows her well and knows her general reputation for truth and veracity and the same is utterly bad. [68—45]

That affiant heard Mrs. Nelson say that she would kill Casey."

AFFIDAVIT OF E. G. KOCH.

"E. G. Koch, being first duly sworn, says: That he is the owner of a market near Rainier Avenue and Orcas Street, in Seattle, near where one Mrs. Frances Nelson resides. That affiant has often seen said person and has sold meat and other things to her and has often talked to her that affiant knows her general reputation for truth, honesty, and integrity in the community where she resides that her said reputation is bad and affiant would not believe her under oath."

AFFIDAVIT OF E. L. DILLERY.

"E. L. Dillery, being first duly sworn, says: That he resides with his family at 1726 West 63rd Street, in Ballard. That he is well acquainted with the woman who goes by the name of Mrs. Frances V. Nelson and who lived with Fred Nelson as his wife. That affiant is engaged in the transfer business and in 1924 moved the goods and effects of said Frances Nelson from 1507 West 57th Street in Ballard, to rooms at No. 6029–14th Avenue N. W., Ballard, and she then moved to 908 West 51st Street, Ballard. That the picture of said person was in the P. I. on June 25, 1926, and mentioned as a witness against defendant herein."

AFFIDAVIT OF EDWARD LENHEART.

"Edward Lenheart, being first duly sworn, says: That he resides at 1126 West 63rd Street, Ballard, and drives a market delivery truck. That affiant met a person known as Mrs. Fred Nelson and knows she resided at 908 West 51st Street, Ballard, in 1924. That her picture appeared in the Seattle P. I. on June 25, 1926, in a news article as a Government witness against defendant herein. That said Mrs. Nelson told affiant she was a bootlegger and it was necessary to live at various places but that she was too smart for the police to catch her."

AFFIDAVIT OF AUGUST PELASKEY.

"August Pelaskey, being first duly sworn, deposes and says: That he owns a meat market at 6017–14th Avenue N. W., Ballard. That he knows Frances V. Nelson, who was also known as Mrs. Fred Nelson, that affiant often sold meat to her while she resided at 908 51st Street in Ballard, in 1924. That she makes false statements and is a persistent falsifier, that her general reputation in the community where she has lived for truth, veracity, and integrity is very bad."

AFFIDAVIT OF JOHN DOLAN, W. B. WHITE, C. A. SHUART, AND S. B. OVERTON.

John Dolan, W. B. White, C. A. Shuart, and S. B. Overton, each being first duly sworn, deposes and says: That he was one of the jurors who sat and

tried the above-named defendant: That on the first ballot eight of the jurors voted to acquit defendant, Thomas J. Casey; that affiants' attention has been called to the affidavits of Harry Short, Edward Lenheart, John P. Whalen, C. L. Stevens, August Pelaskey, and others regarding the character and reputation of Mrs. Frances Nelson for truth and veracity that if such matter as therein set forth had been presented to the jury that a speedy acquittal of defendant would have resulted."

AFFIDAVIT OF JOHN P. WHALEN.

"John P. Whalen, being first duly sworn, deposes and says: That he is engaged in the bakery business near Rainier Avenue and Orcas Street, in Seattle; that he has often met Mrs. Frances Nelson, that after the arrest of defendant, Thomas J. Casey, affiant said as [69—46] follows: 'I see they got Casey the Lawyer. Gee, they sure are getting the doctors and lawyers.' To which Mrs. Nelson said, 'Oh, that's a frame-up.' Affiant then said, 'How do you know it's a frame-up?' She said, 'I know.' Affiant repeated, 'How do you know?' She answered, 'I know they framed my brother-in-law.' Affiant again asked, 'Yes, but how do you know this is a frame-up?' She answered, 'I know for I just came from the Federal's office.' Affiant then asked, 'What were you doing there?' She answered, 'I work there.'"

Affiant further states that he met said Mrs. Nelson a day or two before the trial and said to her, 'I heard you are going to be the star witness.' She

answered, 'No, I'm not a witness.' That affiant never met defendant, Casey, until after the trial and has no interest in the case except to see that injustice is not done."

AFFIDAVIT OF MRS. JAMES LIVINGSTON.

"Mrs. James Livingston, being first duly sworn, deposes and says: That she resides with her family, husband and three boys, in Seattle, for ten years. That she knows a person who in 1922 was introduced to her as Mrs. Kelley, who was formerly married to Roy W. Murray; that such person now goes by the name of Mrs. Frances Nelson. That affiant has personally examined the marriage records in the clerk's office of King County, that it appears said Frances Nelson was originally Frances V. Love and came from Cle Elum, Kittitas County, Washington, and was married to Roy W. Murray on June 14, 1915. See book A 5 P. 85 of Marriage Certificates. That on June 14, 1919, said person, known as Mrs. Nelson, was married to Arthur J. Kelley. That on April 3, 1922, she brought an action against said Kelly for divorce, in King County cause No. 158151 in said Superior Court. That cause has never been tried."

AFFIDAVIT OF A. P. CASEY.

"A. P. Casey, being duly sworn, deposes and says: That he has taught chemistry for several years in the High and Normal schools of Wisconsin and Washington. That affiant knows and states from his knowledge of chemical reaction that the transfer of morphine solution cannot be pressed into a towel by an electric flat-iron so as to be used

by the addicts in jail, that such transfer would be an impossibility. That morphine loses all water at 120 degrees of heat and 150 degrees begins to supline or vaporize that above 230 degrees it chars and then becomes practically insoluble in water, except by skilled treatment. That Albert Jacobson informed affiant that he could not discover morphine in Exhibit 11, if he *if he* had not been told where to find it by Agent Patterson; that he dissolved the 3.4 grains of morphine by a process totally beyond the addict's in jail."

AFFIDAVIT OF JOHN DOLAN, S. B. OVERTON, W. B. WHITE AND RICHARD ZORNS.

"John Dolan, S. B. Overton, W. B. White and Richard Zorns, each being duly sworn deposes and says: That he was a juror who tried the defendant, Thomas J. Casey; that after the first ballot, which was eight for acquittal, a question arose as to the handwriting on Exhibit 10, most of the jurors believing defendant did not write the words 'Roy Nelson King County Jail,' on said exhibit; one of the jurors then said that he had attended a class of private schools which had also been attended by defendant; that the system of handwriting taught in such private schools was the same system as that used by the person writing the words 'Roy Nelson King County Jail' on Exhibit 10; that he was fully convinced from such fact that defendant wrote the disputed words and that the other jurors could take his word for it. That such statement

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of [70—47] the juror was thereafter considered by the jury in arriving at their verdict."

No counter-affidavits were served or filed.

Upon consideration of said motion for a new trial and said affidavits the motion was denied September 20, 1926, and defendant allowed an exception.

The plaintiff in error prays that his amended bill of exceptions may be allowed, settled and signed.

J. C. ALLEN,
JOHN T. CASEY,
JOHN T. CASEY,
Attorneys for Plaintiff in Error. [71—48]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The preceding forty-eight pages are settled as a bill of exceptions in the above-entitled case, being agreed upon by the attorneys for the plaintiff and defendant, except as settled upon a hearing at which both were present.

Done in open court this 24th day of Feb., 1927.

EDWARD E. CUSHMAN,
Judge.

Copy received of the foregoing amended bill of exceptions admitted this 11 day of January, A. D. 1927.

THOS. P. REVELLEE,
U. S. Attorney.
PAUL D. COLES,
Asst. U. S. Atty.

[Endorsed]: Original Bill of Exceptions. Lodged in the United States District Court, Western District of Washington, Northern Division, Sep. 29, 1926.

[Endorsed]: Filed Feb. 24, 1927. [72]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 10, 1927, TO PREPARE AND TRANSMIT RECORD.

It appearing to the Court that the bill of exceptions has not yet been settled, and that further time is necessary for the Clerk to prepare, certify and file, and transmit the transcript of the record to the Circuit Court of Appeals, now on motion of defendant herein, plaintiff in error, it is now and hereby:

ORDERED, that the time for filing the record in the Circuit Court of Appeals be extended, and that plaintiff in error is hereby allowed until January 10th, 1927, in which to have the record prepared and transmitted to said Circuit Court of Appeals, and filed therein in support of his writ of error.

Dated December 6th, 1926.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Dec. 6, 1926. [73]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 7, 1927, TO FILE RECORD.

IT IS HEREBY ORDERED, that the time for filing the record in the Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended up to and including the 7th day of February, 1927.

Dated and done in open court this 3 day of January, 1927.

EDWARD E. CUSHMAN.

[Endorsed]: Filed Jan. 3, 1927. [74]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING MARCH 7, 1927, TO FILE RECORD.

IT IS HEREBY ORDERED, that the time for filing the record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended up to and including the 7th day of March, 1927.

Dated and done in open court February 7th, 1927.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Feb. 7, 1927. [75]

[Title of Court and Cause.]

ORDER TO TRANSMIT ORIGINAL EXHIBIT.

The Exhibit No. 10 in the above-entitled cause being material to the determination of the issues raised by the assignments of error herein, now, therefore,

IT IS ORDERED that the original Exhibit Ten (10) admitted in evidence at the trial of the above-entitled cause be forwarded by the Clerk of this court to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated at Seattle, this 1st day of March, 1927.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed Mar. 1, 1927. [76]

[Title of Court and Cause.]

STATEMENT OF THOMAS J. CASEY.

State of Washington,
County of King,—ss.

Thomas J. Casey, being first *duly deposes* and says:

That he is the defendant, and plaintiff *is* error in the above-entitled action; that he is a citizen of the United States; that because of his poverty affiant is unable to pay or prepay the fees and costs for certifying and printing the record herein on the

writ of error which affiant has sued out for the review of his case in the Ninth Circuit Court of Appeals, or to give security for the same; that affiant believes he is entitled to the redress he seeks by such writ of error.

That said writ of error is sued out from a judgment wherein affiant is found guilty of having the unlawful possession of 3.4 grains of morphine, and of selling the same.

That the whole case against affiant was based essentially on the evidence of one witness, whom affiant believes was impeached by physical facts and the testimony of several witnesses of undisputed integrity.

That eight of the jurors voted for affiant's acquittal on the first ballot and made affidavits that if the impeaching evidence against said witness had been produced at the trial a speedy acquittal would have resulted.

That several jurors made a further affidavit that one of the jurors gave testimony against affiant in the jury-room which was considered by the jury in arriving at their verdict.

That affiant asks that the record be certified and filed by the Clerk, and sent to the said Ninth Circuit Court of Appeals, so that said writ of error may be heard without printing the record, and without affiant prepaying the fees and costs therefor.

THOMAS J. CASEY.

Subscribed and sworn to before me this 7th day of February, A. D. 1927.

[Seal] LIONEL A. MICHELSON,
Notary Public for the State of Washington, Residing at Seattle.

[Endorsed]: Filed Feb. 26, 1927. [77]

[Title of Court and Cause.]

ORDER TO TRANSMIT RECORD IN FORMA PAUPERIS.

On consideration of defendant's application for an order allowing him to prosecute his writ of error herein *in forma pauperis* and without the prepayment of costs and fees,—

IT IS HEREBY ORDERED, that said application is granted in so far as work and services by the Clerk of this court is necessary to the prosecution of such writ of error.

Done in open court this 25 day of February, A. D. 1927.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Feb. 25, 1927. [78]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Ed. M. Lakin, Clerk:

You will please prepare a typewritten transcript of the record in the above-entitled cause on writ of error and file the same, and transmit the same certified, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, such record to comprise the following papers and documents:

1. Indictment.
2. Verdict.
3. Judgment.
4. Petition for writ of error.
5. Order allowing writ of error.
6. Citation on writ of error.
7. Writ of error.
8. Motion in arrest of judgment.
9. Motion for new trial, with supplemental motion.
10. Assignment of errors.
11. Bill of exceptions, with exhibits.
12. Bond on appeal.
13. Order to file record, with affidavit therefor.
14. This praecipe for record.

JOHN T. CASEY,
JAY C. ALLEN,
JOHN T. CASEY,
Defendant's Attorneys.

Due service of the foregoing praecipe admitted and copy received February 26, 1927.

ANTHONY SAVAGE,
Asst. United States Attorney.

[Endorsed]: Filed Feb. 26, 1927. [79]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 84, inclusive, to be a full, true, correct, and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs, fees and charges incurred in my office by or on behalf of the plaintiff in error for making record, certificate or return

to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, amount to $33.40. [80]

I further certify that by order of Court, filed and shown herein, the plaintiff in error has been allowed to prosecute his writ of error *in forma pauperis* in so far as work and services by the Clerk of this court is necessary to the prosecution of said writ of error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 3d day of March, 1927.

[Seal] ED. M. LAKIN,
Clerk U. S. District Court, Western District of Wash.

By S. E. Leitch,
Deputy. [81]

[Title of Court and Cause.]

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, to the Hon. E. E. CUSHMAN, Judge of the District Court of the Western District of Washington, Northern Division, and to said Court, GREETING:

Because in the record and proceedings as also in the rendition of the judgment and sentence in

the District Court of the United States for the Western District of Washington, Northern Division, in a cause pending therein, wherein the United States of America was plaintiff and Thomas J. Casey, defendant, it is charged a manifest error happened and occurred to the damage of the said Thomas J. Casey, the above-named plaintiff in error as by his petition and complaint doth appear, and we being willing that error, if any there has been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that under your seal you send the record and proceedings aforesaid with all things concerning the same and pertaining thereto to the U. S. Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you may have the same at San Francisco where said court is sitting within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held and the records and proceedings aforesaid being inspected the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and the custom of the United States should be done.

WITNESS, the Hon. WILLIAM HOWARD TAFT, Chief Justice of the [82] United States, this 29th day of September, 1926.

[Seal] ED. M. LAKIN,

Clerk of the United States District Court, for the Western District of Washington.

By S. E. Leitch,

Deputy.

Allowed this 29th day of September, 1926.

EDWARD E. CUSHMAN,
District Judge.

Received a copy of the foregoing writ of error this 29 day of September, 1926.

THOS. P. REVELLE,
PAUL D. COLES,
U. S. Attorney.

[Endorsed]: Filed Sep. 29, 1926. [83]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in a session of the U. S. Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Thomas J. Casey is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against Thomas J. Casey, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable E. E. CUSHMAN, Judge of the District Court of the United States,

for the Western District of Washington, this 29th day of September, 1926.

[Seal] EDWARD E. CUSHMAN,
District Judge.

Due service of a copy of the foregoing citation admitted this 29 day of September, 1926.

THOS. P. REVELLE,
PAUL D. COLES,
District Attorneys.

[Endorsed]: Filed Sep. 29, 1926. [84]

[Endorsed]: No. 5104. United States Circuit Court of Appeals for the Ninth Circuit. Thomas J. Casey, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed March 18, 1927.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 5104

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the nineteenth day of May, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable FRANK S. DIETRICH, Circuit Judge.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER OF SUBMISSION.

ORDERED above cause argued by Messrs. William F. Herron and John T. Casey, counsel for the plaintiff in error, and by Mr. Paul D. Coles, Assistant United States Attorney, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file a reply brief within fifteen (15) days.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER DIRECTING FILING OF OPINION AND CONCURRING OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Honorable William B. Gilbert, Frank H. Rudkin and Frank S. Dietrich, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

By direction of the Honorable Frank H. Rudkin, Circuit Judge, ORDERED that the concurring opinion this day rendered by him be forthwith filed by the Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the United States District Court, Western District of Washington, Northern Division.

Before GILBERT, RUDKIN, and DIETRICH, Circuit Judges.

DIETRICH, Circuit Judge.—Defendant (plaintiff in error) was adjudged guilty upon both counts of an indictment charging him, (1) with the purchase of 3.4 grains morphine not in the original stamped package, and (2) with having dispensed morphine without having registered or paid the special tax as required by law, venue of both charges, Seattle, Washington, and time of both, December 31, 1925. The sentences were the same

on both counts, the terms of imprisonment to run concurrently.

The sufficiency of the first count is not seriously challenged. One of the clauses is grammatically misplaced, but the meaning is so obvious that to quash upon that ground would be a pure legalism. The question of the constitutionality of the Harrison Narcotic Act is raised only for procedural purposes, and properly counsel refrain from urging reconsideration of it here.

Count II is assailed as "purely a blanket charge." It sets forth that on December 31, 1925, at the city of Seattle, defendant without having registered or paid the special tax as required and imposed by law, did knowingly and feloniously "manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away morphine." There is no averment of the amount of the drug or of the persons to whom it was dispensed. While we are unable to approve the practice of including in a charge all the acts denounced by the statute, where it is known the evidence will have no tendency to support some of them, it is well settled that such a form of pleading is not fatally defective. Here there probably never was any thought of attempting to prove that defendant manufactured or produced or compounded, but we are are unable to see how the inclusion of these terms was prejudicial. In one aspect the failure to allege the amount of the drug or the identity of the persons to whom dispensed, would seem to be more serious. But as bearing upon both the charge and

certain evidence to which defendant objected, adduced in support thereof, it is to be borne in mind that the offense denounced by the statute may be and often is evidenced not by a single act but by a series of acts of the same character. To prove that a defendant is dealing in, dispensing, or distributing morphine, the Government may show few or many transactions in which he has sold or furnished the drug. In such a case it might be impracticable and certainly not necessary to plead the details of such transactions, for after all they are but evidence of the ultimate fact to be found. In no way did the defendant here challenge the indictment until after a verdict, and as against a motion in arrest of judgment it is plainly invulnerable. Had he complained before trial that in view of the generality of the charge he could not intelligently or safely prepare his defense, it is to be presumed that upon seasonable application the Court would have ordered a reasonably certain bill of particulars. See Stubbs vs. United States, 1 Fed. (2d) 837, where we affirmed a judgment upon a similar charge, a bill of particulars having been sought and secured.

Defendant relies mainly upon Miller vs. United States, 288 Fed. 816, and Johnson vs. United States, 294 Fed. 753, the latter decided by this Court. In both cases the indictment was assailed by demurrer, for uncertainty as well as insufficiency. In the former the first ground was sustained but the second apparently overruled. In the Johnson case the

charge was not the same as here and presented somewhat different considerations.

As to the point that there is no express averment that defendant was a person of whom registration and payment of tax is required, the necessary implication of the allegation is that he was within such class. We so held in Bacigalupi vs. United States, 274 Fed. 367.

Upon the second count the evidence, though conflicting, is ample to support the verdict. As to the first count, to establish the charge of purchase the Government relied upon evidence of possession by the defendant of the drug not in the original stamped package, together with the declaration of the statute that "The absence of appropriate tax paid stamps * * * shall be *prima facie* evidence of the violation of this section by the person in whose possession the same may be found." There was no other evidence of the place of purchase, and arguing that the statutory presumption does not extend to venue, defendant contends the proof was vitally defective. Considering a similar charge in the case of Ny Sing et al. vs. United States, 8 Fed. (2d) 919, we said: "The plaintiffs in error are therefore subject to the presumption arising from possession under the Amendment of 1919, and the presumption alone would carry the case to the jury." But possibly the precise point was not there raised. While defendant's contention is not without support in the decided cases (see Brightman vs. United States, 7 Fed. (2d) 532; Cain vs. United States, 12 Fed. (2d) 580; and Moss

vs. United States, 14 Fed. (2d) 1021), to grant it would seem to rob the statute of all efficacy. If independently of the statutory presumption, the Government must affirmatively prove the place of purchase, it must also by like evidence prove the substantative fact of purchase, for how the place of purchase can be established without at the same time proving the purchase, is not apparent. Fairly construed, the statute in our opinion extends the presumption to the incidental matter of place as well as the substantative matter of purchase. But aside from that consideration, the record fails to show that the question was raised in the lower court. True, the bill of exceptions recites that defendant "challenged the sufficiency of the evidence and requested the Court to instruct the jury" to acquit; but on what grounds is not disclosed. Proof of venue is often easily supplied, and both upon reason and authority it is thought that to make such an assignment available the attention of the trial court must be specifically directed to the defect. Ryan vs. United States, 285 Fed. 734; Jianole vs. United States, 299 Fed. 496.

The several assignments involving the reception of evidence, may be summarily disposed of. Some of them are trivial and so clearly devoid of merit that comment is unnecessary. The only ones seriously argued cover testimony relating to acts and circumstances which it is contended are unconnected with the alleged sale on December 31st, and relate to offenses not charged; but all of it directly or indirectly tended to show that on Decem-

ber 31st defendant was dealing in and dispensing narcotics, and also that defendant was a person required to register; hence, it was relevant (Stubbs vs. United States, 1 Fed. (2d) 837; Braden vs. United States, 270 Fed. 441).

One of the grounds upon which defendant moved for a new trial was newly discovered evidence, supported by numerous affidavits which in the main assail the character and credibility of one of the Government witnesses and tend to show that she was untruthful in some of the testimony she gave. Generally the granting or refusing of a new trial is within the discretion of the Court; and new trials upon this ground are not favored. Under the circumstances, defendant must have known or had good reason to anticipate that this witness would testify for the Government, but there is no showing at all of diligence. The alleged false testimony was brought out on cross-examination as to matters purely incidental and collateral. Upon the whole, while the showing against the credibility of the witness is persuasive, we cannot say that there was an abuse of discretion in denying the motion upon this ground.

Another ground relied upon for a new trial was alleged misconduct of the jury. Specifically, as shown by the affidavits of some of the jurors, the question having arisen in the jury-room whether or not defendant wrote certain words upon the wrapper of a laundry package in which the Government contended defendant smuggled narcotics to prisoners in the county jail, one of the jurors stated that both

he and defendant had attended a private school where the system of penmanship taught was the same as that exemplified in the disputed words, and that he was convinced defendant wrote them. That a writing is in the hand of a defendant because it conforms to a system of penmanship he and many other persons have been taught is such an irrational conclusion that it is beyond belief intelligent men would be greatly influenced thereby. It must be, too, that in their deliberations jurors more or less generally recall experiences in their own lives, and if new trials were commonly granted for such a reason there would be no end to litigation.

The judgment is affirmed.

CONCURRING OPINION OF RUDKIN, C. J.

RUDKIN, C. J., Concurring.—The concurrent judgment is supported by the second count alone, and for that reason I express no opinion as to the sufficiency of the evidence to support the verdict on the first count. I agree with Judge Dietrich that the cases holding that the presumption arising from possession does not extend to the venue would seem to rob the statute of its efficacy, but inasmuch as the Courts of two circuits have so ruled, I think the question should be reserved until it becomes necessary to a decision of some case properly before us.

[Endorsed]: Opinion and Concurring Opinion of Rudkin, C. J. Filed Jun. 27, 1927. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

JUDGMENT U. S. CIRCUIT COURT OF APPEALS.

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Judgment. Filed and Entered Jun. 27, 1927. Frank D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the first day of August, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable FRANK H. KERRIGAN, District Judge.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER DENYING PETITIONS FOR A REHEARING.

Upon consideration thereof, and by direction of the Honorable William B. Gilbert, Frank H. Rudkin and Frank S. Dietrich, Circuit Judges, before whom the cause was heard, IT IS ORDERED that the petitions, filed July 26, 1927, on behalf of the plaintiff in error for a rehearing of the above cause be and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER STAYING ISSUANCE OF MANDATE, ETC.

Upon consideration of the application of Mr. Wm. F. Herron, counsel for the plaintiff in error, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed until after the Supreme Court of the United States passes upon the petition for a writ of certiorari to be hereafter made by the plaintiff in error herein, on condition that the said petition be docketed in the Clerk's office of the said Supreme Court on or before Sept. 1, 1927.

W. H. HUNT,

United States Circuit Judge.

Dated: San Francisco, California, August 2, 1927.

[Endorsed]: Filed Aug. 1, 1927. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5104.

THOMAS J. CASEY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and sixteen (116) pages, numbered from and including 1 to and including 116, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of August, A. D. 1927.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 21, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
SEP 1 1927
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, *Petitoner,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT. AFTER HEARING AND DECISION

JOHN T. CASEY,
Attorney for Petitioner

301 LYON BLDG., SEATTLE, WASHINGTON

Pigott Printing Concern 83 Pike Street, Seattle

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. .....

THOMAS J. CASEY, *Petitoner,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT. AFTER HEARING AND DECISION

To The Honorable the Supreme Court of the United States:

The petition of Thomas J. Casey respectfully shows to this Honorable Court:

That a Writ of Certiorari should be directed to the United States Circuit Court of Appeals for the Ninth District, to review a decision made by that court on June 27, 1927, rehearing denied August 1,

1927, affirming a judgment of the United States District Court for the Western District of Washington, Northern Division, wherein petitioner was adjudged guilty of violating the Harrison Narcotic Act and sentenced to fourteen months imprisonment.

SUMMARY STATEMENT

1. That petitioner has practiced law at Seattle, Washington, for 24 years, and prior to the prosecution, of which this petition is the outgrowth, was never charged with any offense. That he enjoyed an unblemished personal and professional reputation. That on February 24, 1926, the grand jury indicted defendant on two counts as follows:

"COUNT I.

"That THOMAS J. CASEY, on the 31st day of December, A. D. 1925, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully and feloniously, and not in the original stamped package, nor from the original stamped package, purchase from a person whose name is to the grand jurors unknown, a quantity, to-wit, 3.4 grains of a certain compound, manufacture, salt, derivative, and preparation of opium, to-wit, morphine, contrary to the form of the statute, etc."

"COUNT II.

"That THOMAS J. CASEY, on the 31st day of December, A. D. 1925, at the City of Seatle, in the

Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously manufacture, produce, compound, sell, deal in, dispense, distribute, administer and give away a certain compound, manufacture, salt derivative, and preparation of opium, to-wit, morphine, without having registered and paid the special tax as required and imposed by law; contrary to the form of the statute." etc. (Tr. 2-3).

SYNOPSIS OF EVIDENCE

1. There was no proof whatever in support of Count I. The whole effort of the prosecution was to prove, not a purchase, but a sale of 3.4 grains, without alleging it. The Government's case tended to show that petitioner, (hereafter called defendant), had been visiting the King County Jail for many years, the same as other attorneys, and had defended several—though only a small percentage—of the narcotic cases. (Tr. 29).

2. December 29, 1925, narcotic agent, W. J. Patterson, whom defendant had denounced for theft and perjury in two former cases, secured permission from Jailor Stark to install a dictaphone in the jail to hear defendant's conversations with his clients. He then asked Stark to phone for defendant to come and see George Cicero, (a stool pigeon for Patterson), and one Roy Nelson. They lay in wait for defendant three days. He finally came and interviewed these men.

(Tr. 33). Patterson had placed $20 to Cicero's credit and directed the latter to give defendant an order for it. (Tr. 57). Nelson gave defendant an order for $50, but was not called as a witness, nor was he permitted to testify for the defendant.

3. At 1:45 P. M. on December 31, 1925, an alias, Francis V. Nelson, who worked under Agent Patterson, obtained a package of laundry from Patterson or some one else, in or near the narcotic office—where they used green ink. It is contended the 3.4 grains of morphine was ironed into the laundry. She initialed the package with green ink: "F. V. Nelson, 1:45 o'clock, December 31, 1925." (Tr. 51, 78). Forty-five minutes later she first went to defendant's office with the laundry package to induce him to take it to the jail. He was not in. She went back in 20 minutes and found him. (Tr. 44). She asked defendant to take the package to the jail for her alleged brother-in-law, Roy Nelson. He refused. (Tr. 77-8). She then claimed that defendant gave her the package, and wrote on it in her presence: "Roy Nelson, King County Jail." (Tr. 44). Defendant refuted this by two witnesses besides himself, who saw her enter his office with the package, and leave the office with the same package. (Tr. 69, 72). She admitted she left his office and brought the package *BACK* to the Narcotic office—where she got it at 1:45 P. m. (Tr. 42).

4. There was no positive or satisfactory identification by any witness, of the alleged 3.4 grains of morphine. The Government's case tended to show that

defendant promised to obtain morphine for the alleged addicts in jail. But there was no showing that he ever obtained, or had, any. His office was thoroughly searched by three narcotic agents at 8 o'clock that night. No trace or sign of narcotics could be found. (Tr. 39). At the same time Patterson took a deputy marshal to defendant's home and placed him under arrest. Demanded $10,000 bail from him late in the evening prior to a holiday. (Tr. 79).

Defendant testified:

"I asked Patterson what this was all about. I told my wife I would be back in 2 or 3 hours. She did not know I was under arrest. I asked Patterson to take me to Williamson's office, narcotic chief. I said I was ready to tell everything and straighten the matter out. I had done nothing to go to jail for. Patterson would give me no information. He said *you are going to jail now.* You are under $10,000 bail. I asked why such an enormous bond. Patterson told Jailor Barr not to let Casey talk to anybody. I asked Barr to let me phone my wife, but he refused. I was never in any trouble or accused of any crime prior to this. I never sent any narcotics to the jail and never was a party to sending any. I never purchased in this district or elsewhere opium or 3.4 grains of morphine or any other amount. I never told Cicero that I would send him morphine, and he knows I would not. . . . I had nothing to conceal. I talked in a normal tone of voice. Nelson paid me the money absolutely as a retainer and that was the only purpose I received it for. The $20 Cicero paid me was part of my fee. He was to pay me $100." (Tr. 75).

5. Defendant was tried in June, 1926. At the close of the case he challenged the sufficiency of the evidence and asked for an instructed verdict of not guilty on each of the two counts. (Tr. 83-4).

The jury was out all night. On the first ballot eight voted for acquittal. Later one juror informed the others that from certain information he claimed to have, in his possession (not known by the other eleven) he knew defendant's system of hand writing and was satisfied that defendant wrote the disputed words: "Roy Nelson, King County Jail," on Exhibit "10," and that the other jurors *could take his word for it.* (Tr. 89).

After verdict defendant moved an arrest of judgment and for a new trial. The motion in arrest was overruled July 3, 1926: that for a new trial September 20, 1926.

Thereafter defendant duly sued out a writ of error to the Ninth Circuit Court of Appeals, which, after hearing, rendered the decision which your Petitioner now asks to have reviewed.

REASONS FOR ISSUING THE WRIT

The decision in the instant case, holds that the possession of 3.4 grains of morphine, though disputed, and such an amount as any consumer might lawfully possess, is prima facie evidence of a violation of the Harrison Act. That an *unlawful purchase* may be presumed from *possession* alone of such small amount. That this presumption *includes the venue*—the *place* of purchase.

This holding is in direct conflict with decisions on the identical question in the Seventh and Eighth circuits.

See, *Brightman v. U. S.,* 1 Fed (2d) 532. *Cain v. U. S.,* 12 Fed. (2d) 580. *Hood v. U. S.,* 14 Fed (2d) 925. *DeMoss v. U. S.,* 14 Fed. (2d) 1021.

Judge Rudkin withheld assent on this point. (Tr. 113).

COUNT II.

It is admitted the second count is "purely a blanket charge." That it is defective and misleading, but it is held sufficient. The count deals with *registration.* There is no charge that the defendant was dealing in *stamped drugs.* In the Sixth and Eighth circuits it has been held that unless the indictment charges that a defendant is dealing in *stamped,* as distinguished from *un*stamped, drugs, it does not charge a crime.

See, *Weaver v. U. S.,* 15 Fed. (2d) 38. *O'Neill v. U. S.,* 19 Fed. (2d) 322.

The decision in the instant case being in direct conflict with decisions in other circuits on identical questions, in each count, the writ of certiorari should be issued as prayed for.

ERROR AND CONFLICT

Petitioner respectfully submits that the Circuit Court of Appeals erred as follows:

1. In affirming the judgment of the District Court.
2. In holding that Count I was sufficient for any purpose.
3. In holding that Count II was sufficient for any purpose.

4. In holding that the presumption from disputed possession, or any possession of a small amount of narcotics under the Harrison Act, *included the venue,* and was sufficient without proof, to sustain a conviction.

5. In holding that there was any credible or ample evidence to support the verdict on Count II.

6. In refusing to hold that the Harrison Act, is unconstitutional.

Your Petitioner presents and files herewith, Exhibit "A", a duly certified transcript of the entire record in the United States Circuit Court of Appeals, which is hereby made a part of this application, in compliance with Rule 35 of this court.

Your Petitioner also files as a part of this petition, a supporting brief, exemplifying the errors complained of.

Your Petitioner is advised and believes that this Honorable Court should require said case to be certified to it for review and determination in conformity with Section 240, Judicial Code.

WHEREFORE, Your Petitioner prays that a writ of certiorari issue under the seal of this court to said Ninth Circuit Court of Appeals, to review the judgment and decision aforesaid, that such decision, and the decision and judgment of the District Court, may be reversed, and your petitioner will ever pray.

THOMAS J. CASEY,
Petitioner.

JOHN T. CASEY,
Member of the Bar of the Supreme Court, Counsel for Petitioner.

United States of America,
State of Washington, } ss.
County of King.

Thomas J. Casey, being first duly sworn, deposes and says: I am the petitioner named in the foregoing petition for a writ of certiorari; I know the contents of said petition; the facts therein stated are true to the best of my knowledge, information and belief, and this proceeding is not prosecuted, nor is the writ of certiorari applied for, for the purpose of delay.

THOMAS J. CASEY.

Subscribed and sworn to before me this 27th day of August, A. D. 1927.

FRANK F. RANDOLPH,
Notary Public for the State of Washington, residing at Seattle.

United States of America,
State of Washington, } ss.
County of King.

I hereby certify that I am counsel for petitioner named in the foregoing petition and application for a writ of certiorari; that in my opinion the case is one in which the prayer of the petitioner should be granted by this court. That this application is not made for the purpose of delay.

JOHN T. CASEY.

Seattle, Washington, August 27, 1927.

In the Supreme Court of the United States

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Ninth Circuit Court of Appeals.

COUNT I DOES NOT CHARGE A CRIME

Count I of the indictment does not charge sufficient facts to show a violation of the Harrison Act. Briefly, it charges:

That on December 31, 1925, defendant unlawfully purchased at Seattle, 3.4 grains of morphine from an unknown person, not in or from the original stamped package.

Paragraph 12 of the Harrison Act as amended, provides:

"It shall be unlawful for *any person* to *purchase,* sell, dispense, or distribute any of the aforesaid drugs except in or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; . . . PROVIDED, That the provisions of this paragraph shall not apply *to any person* having in his or her possession *any of the aforesaid drugs* which have been obtained *from a registered dealer* in pursuance *of a prescription," etc.* (*Italics ours*).

Count I is not concerned with *registration,* but with a *purchase* only. While it charges the seller of the 3.4 grains is unknown, it fails to charge that *he was not*

registered, or that defendant did not purchase, *in pursuance of a prescription.* In either event the purchase would be lwful. To charge it was *unlawful,* is a mere conclusion. If the amount charged was a pound (5760 grains) we would hesitate to believe it was purchased on a legitimate prescription. Yet it might be true. But the insignificant amount (60 cents worth) (3.4 grains) could be lawfully purchased by any person at any time or place in the United States.

In the *Linder* case, 268 U. S. 5: 69 L. Ed. 809-13, this court said:

"Mere possession of the drug creates no presumption of guilt as against any other person." (Except those required to register).

In *Behrman v. U. S.,* 258 U. S. 280: 66 L. Ed. 619, this court held:

"An indictment for a statutory offense need only charge (but necessarily it *must* charge) facts sufficient to show that the accused *is not within any exception in such statute."*

In *U. S. v. Bathgate,* 246 U. S. 220: 62 L. Ed. 676, it was held:

"There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

See also *Johnson v. U. S.,* 294 Fed. (9CCA) 753. *Lewis v. U. S.,* 295 Fed. (9CCA) 678. *Hampton v. Wong Ging,* 299 Fed. (9CCA) 289. *Lamento v. U. S.,* 4 Fed. (2d) (8CCA) 901.

Count I does not charge a crime against the United States. It is insufficient for any purpose.

EVIDENCE ON COUNT I.

There was no evidence even offered in support of Count I. It is contended by respondent that the statutory presumption of guilt under the Harrison Act, is self-sufficient to convict without proof. That the evidence is sufficient to show that defendant *possessed* 3.4 grains of morphine, and therefore an *unlawful purchase in the District,* may be presumed. There was no *admitted possession. The possession* is presumed on a disputed *sale* of 3.4 grains. From this *presumed* possession an *unlawful purchase* is presumed. If a man can be found guilty solely on a presumption the Sixth Amendment to the Constitution is annulled.

The opinion of the Circuit Court holds that *the venue* is included in the presumption. That to hold otherwise, "would seem to rob the statute of all efficacy."

But later, when holding the record must show that this question was specifically pointed out in the trial court, it is then said: "Proof of venue is often *easily* supplied"—a patent inconsistency. If it is easily supplied, it could not possibly "rob the statute of *all efficacy,*" to require such proof. It was alleged defendant purchased 3.4 grains in the District. If there was no proof, the count should be taken from the jury on the Court's own motion. But if the *venue is presumed,* it is unnecessary to allege it in the indictment. If proof is unnecessary, the allegation is unnecessary —and would be immaterial if made. Hence it is not

necessary to try an accused person "by an impartial jury of the District *wherein the crime shall have been committed.*"—VI Amend. Constitution.

If the venue *is not included* in the presumption, the Government still has a decided advantage in being able to *presume* an *unlawful* purchase from *possession alone.* It does not "rob the statute of all efficacy," to refuse a construction that makes proof of the Government charge wholly unnecessary. If a citizen can be convicted solely on presumption, the Constitution is of little value to him. If a choice *must* be made between the Constitution and the Act. it is better to rob the statute of all efficacy than to rob the Constitution of its supremacy and the citizen of his fundamental rights. We cannot afford a construction that will make the Constitution useless and impotent to protect the citizen.

On this point a majority of the court (Judge Rudkin withholds assent) flatly conflicts with the Eighth Circuit in *Brightman v. U. S.,* 7 Fed. (2d) 532. *Cain v. U. S.,* 12 Fed. (2d) 580 and in *Hood v. U. S.,* 14 Fed. (2d) 925, where Judge Kenyon (who expressed some doubt in the Cain case, about the doctrine in the Brightman case) says: where the possession of the drug is denied [as in the instant case] the statutory presumption is wholly insufficient to convict.

It also conflicts with *De Moss v. U. S.,* 14 Fed. (2d) (7CCA) 1021, where it is said:

"Counsel for plaintiff in error contends that the government failed to prove the venue; that the pre-

sumption referred to in the Act. does not extend to the *place* of purchase. The precise question has been considered and very fully treated in *Brightman v. U. S.*, (CCA) 7 Fed. (2d) 532, and with the ultimate conclusion there reached we agree."

We submit then, that the decision of the Ninth Circuit Court of Appeals in the instant case, being: "in conflict with the decision of another circuit court of appeals on the same matter." Presents sufficient reason for granting a writ of certiorari.

See sub. Div. (b) Sec. 5, Rule 35, of this court.

COUNT II PATENTLY INSUFFICIENT

The second count makes a jumbled charge of nine different offenses against defendant. Some of them utterly inconsistent with others. It is misleading. And such numerous charges must tend not only to confuse the jury but prejudice them likewise. If defendant sold morphine he did not give it away. It would be just as sensible to convict an accused person of grand larceny on a charge of *stealing money,* without naming the person from whom he stole it or that such person was unknown, and without charging whether the amount stolen was ten cents or a thousand dollars, as to convict defendant on the second count in the instant case.

Some crimes may be charged in the language of the statute, but only where such statute clearly sets forth the elements of the offense. Even then sufficient particulars must be given so the accused may plead a

former conviction or acquittal in bar of a second prosecution for the same offense.

In *Miller v. U. S.*, 288 Fed. 816, an indictment almost identical with Count II in the instant case, was held fatally defective. It is there said:

"No person is alleged in these counts to whom it is charged that Miller sold, dispensed, or gave away, any morphine, nor is it alleged that it was sold to persons unknown. Nothing is charged to identify the sales, as between several on the same date."

In *Johnson v. U. S.*, 294 Fed. 753, Judge Rudkin illuminates this point. He says:

"Such an indictment gives no information whatever to the defendant as to the particular nature of the charge against him. He is required to register if he does any one of eight different things having little or no connection with each other. In other words, he cannot know whether he is charged with producing opium or dispensing cocaine. It would seem on general principles that such an indictment is fatally defective."

See also *U. S. v. Cook*, 17 Wall. 168-73: 21 L. Ed. 538-9. *Lynch v. U. S.*, 10 Fed. (2d) 947. *Anderson v. U. S.*, 294 Fed. 593. *Evans v. U. S.* 153 U. S. 587: 38 L. Ed. 830. *U. S. v. Standard Brewery*, 251 U. S. 210: 64 L. Ed. 229-35.

Count II does not inform defendant "of the nature and cause of the accusation," against him.

But neither does it charge any violation of the Harrison Act. Briefly stated it charges:

That on December 31, 1925, defendant unlawfully sold, etc., morphine at Seattle, without having registered and paid the special tax required by law.

It not only fails to charge how much, or to whom, defendant sold morphine, but it also fails to charge whether he sold from stamped or unstamped packages. The purport of Count II was to charge defendant with a violation of the Act for not, "having registered and paid the special tax as required by law."

Paragraph 8 of the Act points out who must register and pay the special tax—those who are dealing in STAMPED, not UNstamped drugs. A person dealing in UNstamped drugs is liable under paragraph 14 to have them seized and forfeited, but REGISTRATION is demanded from only those who deal in *stamped* articles. Others are not eligible to register. This is the express view in *Weaver v. U. S.*, 15 Fed. (2d) (6CCA) 38, where it is held:

"Count specifically charging sale of morphine, not *from* original *stamped* packages, without having registered with collector and paid special tax, *held* not to state offense under Harrison Act, as amended Feb. 24, 1919."

This view was also taken recently in the Eighth Circuit. In *O'Neill v. U. S.*, 19 Fed. (2d) 322, *published* July 16, 1927, *after* the instant case was decided. The opinion commends itself for sound reason, it is held:

"The possession by defendant of *un*stamped drugs *is not prima facie* evidence of violation of the first

penal provision of the Harrison Act, as amended," etc.

In the opinion it is said:

"It will be noted that the only provision for registry and payment of tax by dealers is limited to wholesale dealers who sell *in* the *original stamped package,* and retail dealers who sell *from* the *original stamped package.* . . . We think that it was the intent of Congress by these provisions of § 1 requiring registration and the payment of a special tax, to regulate and control the sale of drugs in or from stamped packages as distinguished from *un*stamped packages, and that the only persons required to register or *that are eligible to register under the Act,* are importers, etc., therein defined."

Here again, we have an irreconcilable conflict between two circuit courts. On one side, the Ninth Circuit in the instant case. On the other, the Sixth and Eighth Circuits—on the sufficiency of Count II—*for failing to register.* The Ninth Circuit has overlooked the plain language of the Act. But the conflict, again, comes squarely under Sub. Div. (b) Sec. 5, Rule 35, of this court. A writ of certiorari should be granted so as to clarify and not confuse the law and that the proper construction may be placed upon the Harrison Act for all alike. If an act is not a violation of the law in one circuit, it cannot be in another.

We expect the writ will issue to settle these conflicting decisions in the different circuits, and shall then point out the insufficiency and absurdity of the evidence in support of Count II. Also that a new trial

should have been granted for misconduct of the jury. We merely wish at this time to specifically but briefly urge the Constitutional question.

THE SO-CALLED HARRISON NARCOTIC ACT IS UNCONSTITUTIONAL AND VOID

This question was squarely raised in the Circuit Court briefs. When touching on that point in argument Judge Gilbert announced orally for the court, that they would not pass upon the Constitutionality of the Act. It will be conceded that Congress has no power to enact moral legislation for the purpose of suppressing the traffic in narcotic drugs. That is a matter exclusively within the reserved police power of the States. *United States v. Doremus,* 249 U. S. 86. *Linder v. U. S.,* 268 U. S. 5. The constitutionality of the Act has been directly passed upon but once (in the Doremus Case) and was left open later in the Daugherty decision, 269 U. S. 360: 70 L. Ed. 309, where this Court said:

"The constitutionality of the Anti-Narcotic Act touching which this court so sharply divided in *U. S. v. Doremus,* 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer v. Dagenhart,* 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20; *Hill v. Wallace,* 259 U. S. 44, 67; and *Linder v. United States,* 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

The earliest case is *U. S. v. Jin Fuey Moy,* 241 U. S. 394. The decision in that case turned solely upon

the question as to whether or not the mere possession of narcotics was a crime under the act. The court held that the possession of the drug alone by an unregistered person was not a crime unless the possessor of the drugs was a person required to register and pay the tax. The constitutionality of the law is not directly passed upon, but it is clearly stated by Justice Holmes that the court would not assume that Congress intended to make criminals out of the large and numerous body of persons within the United States who might have a small quantity of opium in their possession. The learned Justice, in his characteristic vein, very significantly refers to the argument of counsel for the Government that Congress cast the law in the form of a revenue measure "to give it a coating of constitutionality." The net result of the decision was to uphold the act as a revenue measure. It seems, however, that the maximum penalty provided in the act, [imprisonment for five years], is so grossly excessive and so flagrantly disportionate to the offense of failing to pay $3.00 annual tax that Congress could not possibly have intended the act as an excise measure only, but, on the contrary, intended to do what it had no constitutional power to do, namely: to enact police regulation for the benefit of the public morals and welfare, making the act a revenue measure in *form merely,* "to give it a *coating of constitutionality*"

If Congress did not exceed its power in the enactment of the Harrison law there is no limit to which it may not go in the punishment of those who seem to

transgress "the moral standard" set by Congress. It is only necessary to attach some phase of a revenue measure to inflict the most unusual punishment.

CONCLUSION

In conclusion we respectfully submit:

That the conviction of your petitioner on the first count cannot be upheld because it fails to charge a crime, and because of the failure to prove the venue, and that the Circuit Court of Appeals of the Ninth Circuit has rendered a decision in that behalf in direct conflict with the decisions of two other circuits.

That the conviction of petitioner cannot be upheld as to the second count because that count charges no crime and violates defendant's constitutional right to be "informed of the nature and cause of the accusation." That the decision is also in direct conflict with two other circuits.

That the conviction is void as to both counts because the law under which it was had is unconstitutional and void. This Honorable Court has stated that it would consider this constitutional question if properly raised. It has been properly raised. It is therefore, respectfully submitted that a writ of certiorari be granted as prayed for to the end that these important questions may receive from this highest of tribunals the consideration that they deserve.

Dated: Seattle, Washington, August 27, 1927.

JOHN T. CASEY,
Seattle, Washington. *Attorney for Petitioner.*

FILED
JAN 14 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 500.

THOMAS J. CASEY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN T. CASEY,
Attorney for Petitioner.

Seattle, Washington.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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PETITIONER'S SUPPLEMENTAL BRIEF.

We desire to Reply to some things in the Government's Main and Supplemental brief which were handed to us the day before the oral argument. Petitioner was prosecuted for an alleged violation of the Harrison Narcotic Act on an indictment containing two counts. 1. A purchase count. 2. A sale and tax count. The Government now concedes that Count II—the sale and tax count—is out of the case. At page 9 of the Government brief, the headline runs: "THE CONVICTION UNDER COUNT 2 CAN NOT BE SUSTAINED." *Of course we agree.* The reasons why, are stated in our petition and brief for the writ of certiorari.

COUNT I—PURCHASE.

Aside from other questions involved. it must be plain that the Government's admission, seriously impairs the validity, if it does not void, the conviction on Count I—the purchase count. All the Government's evidence that was introduced at the trial, went to support Count II. Only a very small part of it, *indirectly*, supported Count I. The

charge is a *purchase* of 3.4 grains of morphine. There was no direct evidence to sustain the charge as made. The whole purpose was to show *possession* of the 3.4 grains, so as to get the benefit of the statutory presumption of the Act which provides:

> "The absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found."

If the Government was even confined to proving *possession* of the 3.4 grains, little of the evidence introduced to support Count II, would have been admissible if Count I was standing alone, as it is now conceded it should be. This fact alone should entitle defendant to a new trial on Count I.

Count I charges that on December 31, 1925, defendant *purchased* from an unknown person, 3.4 grains of morphine *in the District at Seattle*, and which was not in or from a stamped package. There was no evidence to support *any purchase*, at any time or place. If the "character assination" testimony was cut out of the record, there would be little or nothing *of concrete evidence of material fact* left to show *possession* of the 3.4 grains. If we allow ourselves to be carried away with *the abuse of defendant*, and jump to the conclusion that he could perform miracles in supplying narcotics to prisoners when he never had any, when the record fails to show that he ever made a single purchase; that in a thorough search of his person and office not even *a trace of narcotics* could be found (39), we may convince ourselves that the showing of *possession* is sufficient to consider the statutory presumption. We do not believe the evidence takes the case beyond speculation and conjecture on any point. This is not sufficient to support a verdict. See, Nor. Ry. Co. *vs.* Page, 274 U. S., 65.

In U. S. *vs.* Jin Fuey Moy, 241 U. S., 394, and in Linder *vs.* U. S., 268 U. S., 5, this court held that mere possession of narcotics was not a crime, and in the former that Congress *could not make it a crime* without invading the police power.

If the court adheres to those decisions in the instant case, the conviction under Count I, must be set aside.

A REVENUE MEASURE.

In the foregoing, and other cases, this court has further held that the Harrison Act can only be upheld as a revenue measure, *and within the limits of a revenue measure.* The Government is interested in collecting its revenues. It should not be interested in punishing real or imagined wrong doing within the states. In the instant case, defendant's promises to obtain morphine, if he ever made any, could not violate the Harrison Act. It might disregard the King County Jail rules, but the Government is not interested in that. It is conceded that defendant was not required to register and pay the occupational tax. The amount of tax on each ounce, or fractional part thereof, is one cent. If defendant, then, ever had possession of the 3.4 grains, the fractional part of an ounce, and the tax on it was not paid—he would owe the Government the munificent sum of one whole cent.

Is the Government so interested in the collection of its revenues that it will punish a citizen with 14 months at hard labor in the penitentiary for the failure to pay it one cent? If that was the intent of Congress in the enactment of the Harrison Law it either went back several centuries to a semi-barbarous age when men were hung, drawn, and quartered for trifling offenses, or else it merely put a Revenue Mask on the Police Power it used without right.

Let us illustrate what may be done under the law:

A citizen goes to a registered dealer with a prescription for an ounce of morphine. It is sold from a stamped package. The purchase is legitimate at the moment, but the purchaser goes home across a District or State line. A narcotic agent follows and arrests him. He searches his person and finds the morphine without a stamp on it. This is prima facie evidence that the Act was violated. Six months later he is tried. The seller is dead or gone to parts unknown, and the stamped package has long since been wholly used and sent to

garbage. The citizen has no record evidence and is convicted. He gets five years in the penitentiary and is disgraced forever. It appears like an abortion of justice. But it can be committed under the Harrison Act.

Is the punishment illustrated, or that inflicted in the instant case, only such incidental restraint as a taxing act should employ? Or is it aimed at punishment for a covert purpose? To ask the question is to answer it. We quote again from Child Labor Tax Cases, 259 U. S., 20:

> "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

QUESTIONS PRESENTED.—VENUE.

At page 2 of the Government brief, it is said:

> "The *principal* question in this case is whether the provision in section 1 of the Harrison Act, to the effect that the absence of appropriate tax-paid stamps from the drugs shall be prima facie evidence of a violation of the section by the person in whose possession the same may have been found, should be construed not only to raise a presumption *of the fact of unlawful purchase*, but also that *the place of purchase* was in the District where the unstamped drugs are found in the possession of the accused."

At page 13 it is said:

> "The statute does not expressly state that possession shall be prima facie evidence that the unlawful purchase took place where the possession occurred."

At page 11 it is argued:

> "THE STATUTE SHOULD BE CONSTRUED TO MAKE POSSESSION OF UNSTAMPED DRUGS PRIMA FACIE EVIDENCE OF **THE PLACE** AS WELL AS **THE FACT** OF UNLAWFUL PURCHASE, AND SO CONSTRUED IT IS NOT INVALID."

We think such a construction would make it invalid. But, first, it would not be a legitimate construction of the Act as Congress passed it, but would be an amendment of it. By a few additional words Congress itself could have made *possession* of unstamped drugs, prima facie evidence of "the place" as well as "the fact" of purchase. Congress did not see fit to do that. The reason why, and the lessened evidentiary effect of the presumption, are both immaterial here. That was for Congress to decide. The presumption now in the Act is not doubtful in what it does say. Congress merely omitted a clause which the Solicitor General would like to have it contain, but he should appeal to Congress, not to this Court, for such a clause. If the Court will read into the Act the words Congress omitted—no doubt on purpose—then he will not have to appeal to Congress. A charge under the Act then, will practically mean conviction without the need of proof. The accused might be able to prove his innocence but he will have to do that. The charge will need little if any proof. A construction that adds something to the law, is not construction but legislation. He might as well ask the Court to declare that: "Congress didn't use all the words it intended to use in the Act. Congress didn't say all it meant to say about venue in the presumption. We will complete it under the guise of construction."

CONSTITUTION.—PURCHASE AND POSSESSION NOT THE SAME.

Second, the construction requested would impair the force and effect of the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law."

To read something into the law is not permissible. It is equally obnoxious to give to the language used in the Act, *a*

strained construction, to make it cover a case that it was not plainly intended to cover. To include "the venue" in the presumption of the Harrison Act would also make it conflict with the plain and positive mandate of the Constitution. "Purchase" and "Possession" are not the same thing in the Harrison Act. *Purchase*, when not made from a stamped package, is made a crime. *Possession*, is only evidence of a crime—not the crime itself. It is prima facie—not conclusive—evidence, that a crime has been committed, that the Act has been violated. But it is always necessary under the Constitution to show where that crime was committed—*the purchase made*, where the Act was violated, the same as any other crime. If it can be presumed that *a purchase* was made in a District, merely because *possession* was had there, then the venue can change and be in any one of several districts. It would follow into the District to which the prima facie evidence was carried. It would be unnecessary to allege where the purchase was made, the law violated, the crime committed. The place of purchase and *the changeable place* of possession, would often, if not generally, be different. If the accused can be charged and tried in any District where the evidence against him is found, he could often be tried in more than one District—in the District where he *actually purchased the drugs*, and again where it *was presumed he purchased them*. The place of trial would be movable. Possession, rather than purchase, would give jurisdiction. The prima facie evidence—possession—might be found in any District. That is often different from where the purchase was made—the crime committed. Under the construction requested the accused could not rely on his Constitutional right of being tried in the "State and District wherein the crime shall have been committed." If the terms of the Act, or the construction sought to be placed on it, can fix the place of trial in disregard of the Constitution, "the venue" becomes a matter of discretion and minor concern. Such a construction would surely weaken, would impair, the Constitutional guaranty of a trial where the crime was com-

mitted. The terms of the Act would prevail over the Constitutional right. The Congressional Act would become superior to the Constitution. A paradox would result. The fundamental law would not be fundamental, but subject to the usurping power of its own legislative servant and creature. The Brightman case, 7 F. (2d), 532, DeMoss, 14 F. (2d), 1021, and other cases on this line are sound and should be approved.

NO VIOLATION OF ACT SHOWN IN RECORD.

At page 4 of the Government's Supplemental brief, it is said:

> "The charge is *purchase* of drugs on which the stamp tax had not been paid, and *possession of unstamped drugs* only enters into the case as the basis for the statutory presumption that the drugs were unstamped when purchased."

And at page 12 of the main brief, it is said:

> "*Proof of possession of unstamped drugs*, therefore, was sufficient to raise the presumption of the fact of unlawful purchase."

Where is the *proof of possession of unstamped drugs?*

It is not contended that defendant ever had a package of drugs—stamped or unstamped. Count I charges that he purchased 3.4 grains of morphine from *an unknown seller who had the unstamped package.* There was no proof that *the package* from which the 3.4 grains came, *was actually unstamped.* It is the Government's contention—not the defendant's—*that the 3.4 grains were unstamped*, and that this gave rise to the statutory presumption that *the package* from which it came, was also unstamped. We agree with Justice Holmes, that to require a penny stamp on the 3.4 grains, or on the towel or "other container" in which it was found, separate from the package from which it was taken, and then proof that the penny stamp was or was not there, does seem ludicrous. Yet that seems to be the plain terms of this peculiar Act. And it is now the solemn contention

of the Solicitor General, as quoted above from both Main and Supplemental briefs. They say in effect: It may appear absurd to require you to carry an appropriate stamp and use it when you get a grain of morphine, but unless you do this thing that appears absurd, you will go to the penitentiary. It is elementary then, that it was necessary for the prosecution to prove that there were no stamps on the alleged 3.4 grains. If they failed to make that proof, then they can not presume under the statute that the package from which the 3.4 grains came, was an unstamped package. This leaves Count I without the shadow of proof to sustain it, as the statutory presumption can not be used for any purpose until *the absence of the stamps* appears affirmatively established. An accused person might as well be convicted of murder without showing that any one was killed. It was imperative then for the prosecution to prove "*the absence of appropriate tax-paid stamps from*" the 3.4 grains. In oral argument the Solicitor General said: "Certainly there were no stamps on the laundry." How does he know that? His statement is only an oral assertion. There are many similar written assertions in the briefs. But such assertions are not proof of the fact. Where is the proof in the record? It is not there. We asked the Solicitor General to point it out in the proof. He failed to do so. Assertions are not facts or evidence of facts. Proper stamps were on the 3.4 grains or they were not. It was just as necessary to prove "*the absence* of appropriate tax-paid stamps" on the 3.4 grains, as to prove that defendant *possessed* the 3.4 grains. Neither fact can be presumed. *It is only after both facts are proven* that the statutory presumption can be availed of by the prosecution. One presumption can not be based on another presumption. See, C. M. St. P. Ry. *vs.* Coogan, 271 U. S., 472. The same ordinary rules of evidence should prevail in the instant case that universally prevail in every other case, civil and criminal.

Count I is wholly based on defendant's alleged failure to have an appropriate tax-paid stamp on the 3.4 grains, yet not a word of proof is in the record. We can only guess, or conjecture, that the stamps were absent. If any presump-

tion is indulged in, it must be that the law was complied with, not violated. Throughout the Government's briefs the arguments are based on defendant's "possession of unstamped drugs," and yet it never proved, or offered to prove, the absence of the stamps on which the argument is based. *It failed to prove that any of them were unstamped.*

Giving the prosecution the benefit of every possible inference that can be drawn, there was a complete failure of proof on Count I. There can be no dispute on that point. There was no proof of any kind or character to submit to the jury on Count I, even if possession of the 3.4 grains was openly admitted. If there were stamps on the 3.4 grains the Act was not violated in any way. And the absence of appropriate stamps must be shown. It was just as essential to prove *the absence of stamps*, as *the presence of morphine*, in the towels. Without the proof of both these essential facts, the jury had nothing to pass on.

CONCLUSION.

The Government has concluded that the conviction can not be sustained on Count II. It must be equally apparent that the conviction on Count I can not be sustained. The case was founded on a desire for revenge. It was supported by patently false testimony. The verdict of guilty was obtained by the partisanship of a juror, who appeared to have been "a plant" in the jury box. There never was a case in either law or fact. It is hard to understand how the case got this far. But it is here. The motion for a directed verdict on each count should have been sustained in the trial court. The judgment of the lower courts should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1927

Thomas J. Casey, Petitioner

v.

United States of America

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF ON THE MERITS

On November 21, 1927, this Court granted a Writ of Certiorari to review a judgment of the Ninth Circuit Court of Appeals, wherein Petitioner's conviction in the District Court under the Harrison Narcotic Act, was affirmed. The Clerk of this Court assured us the case would not be reached for argument until Spring, but recently the case was advanced for hearing on January 9, 1928. For that reason this brief is somewhat late and we must ask the indulgence of the Court to consider it.

The conviction was had on an indictment containing two counts. First, a *purchase* count, charging Petitioner with an unlawful purchase of 3.4 grains of morphine in the District at Seattle. Sec-

ond, a *registration and tax* count, charging that he sold morphine (no amount stated) without registering and paying the special tax. (R. 2, Petition pp. 2 and 10). No proof was offered to support Count 1. The prosecution relied wholly on the presumption of an unlawful purchase from the alleged possession of the 3.4 grains. The Circuit Court of Appeals (Judge Rudkin not concurring) sustained this position in direct conflict with the Seventh and Eighth Circuits on the failure to *prove venue.*

See, *Brightman v. U. S.*, 7 F. (2d) 532. *Ezzard v. U. S.* 7 F. (2d) 808, *Hood v. U. S.*, 14 F. (2d) 925, *Cain v. U. S.*, 12 F. (2d) 580, *DeMoss v. U. S.*, 14 F. (2d) 1021.

COUNT II OUT OF CASE

There is also a direct conflict between the Ninth Circuit in the instant case, and the Sixth and Eighth Circuits on the question of registration and payment of special tax, as charged in Count II. See, *Weaver v. U. S.*, 15 F. (2d) 38; *O'Neill v. U. S.*, 19 F. (2d) 322. The Government now concedes, however, that under the Harrison Act, and the evidence in this case, that Petitioner was not required to register or pay the special tax. At page 7 of the Government Brief, after reviewing the evidence, it is said:

> "The evidence thus failed to show that the Petitioner was a person required to pay a dealer's special tax."

And at page 9:

> "We have concluded that the conviction under Count 2 may not be sustained."

We may consider, then, that Count 2 is out of the case. For present purposes, this narrows the discussion to Count 1.

COUNT I.

We contend that Count 1 does not state facts sufficient to show a violation of the Harrison Act, when the Act is fairly construed. At pages 10 and 11 of our brief supporting the Petition, we pointed out that in Paragraph 12 of the Amended Act, certain purchases of narcotics are unlawful, unless made: "In or from the original stamped packages." And that in the same paragraph it is further provided:

> "That the provisions of this paragraph shall not apply to any person having in his or her possession *any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription.*" etc. (Italics ours)

There is no allegation in Count 1, or in the indictment, to show that Petitioner failed to purchase the 3.4 grains of morphine "from a registered dealer in pursuance of a prescription."

That part of paragraph 12 which provides for lawful purchases of the drug, should have the same

force and effect as that part which makes other purchases *unlawful.* It is elementary that to make an indictment good, it must allege *sufficient facts* to show a violation of the law under which it is drawn. It is not sufficient to merely allege a conclusion *that the purchase was unlawful.* The facts alleged must bring the purchase under that part of the law which *makes it unlawful.* In the instant case, Count 1 does not do that. It does not allege that Petitioner purchased the 3.4 grains from an unregistered dealer, or that he did not have a prescription for it. It fails to take the purchase out of the PROVISO, or exception, *for lawful purchases.* It, as far as the facts alleged are concerned, may have been either lawful or unlawful.

> "An indictment for a statutory offense need only charge facts sufficient to show that the accused *is not within any exception* in such statute."
>
> *Behrman v. United States,* 258 U. S. 280: 66 L. Ed. 619.
>
> "The indictment must show that the accused is not within the exception."
>
> *Anderson v. U. S.,* 294 Fed. 593: *Lynch v. U. S.,* 10 Fed (2d) 947. 38 L. Ed. 830.
>
> See also, *Evans v. U. S.,* 153 U. S. 587: *U. S. v. Standard Brewery,* 251 U. S. 210. 64 L. Ed., 229-35.
>
> "There can be no constructive offenses, and before a man can be punished, his case must

be plainly and unmistakably within the statute."

U. S. v. Bathgate, 246 U. S. 220: 62 L. Ed. 676.

Count 1 fails to show, "plainly and unmistakably", that Petitioner violated the Harrison Act. If the Count is all true, his purchase of the 3.4 grains may have been perfectly lawful. If made "from a registered dealer in pursuance of a prescription," it was lawful and the Act was not violated.

NO EVIDENCE VENUE

No evidence was even offered in support of Count 1. There is nothing to enlarge the count. The prosecution claimed that Petitioner *had possession* of the 3.4 grains of morphine. That this was self-sufficient to convict under the statutory presumption which provides:

> "The absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found."

It is contended that this statutory presumption of an unlawful purchase, from possession alone, extends also to the venue—the place of purchase. If possession of a large quantity of narcotics is admitted, or clearly established, it may be *prima facie evidence* of a violation of the Act—*an unlawful pur-*

chase. But the Act does not presume *where* the Act was violated, or *where* the unlawful purchase was made. If it were impossible for an accused person to purchase morphine in one District, and later have possession of it in another District, the inference of an unlawful purchase in the District where he was found in possession of it, might be legitimately drawn. But a purchase in one District and possession in another District, is not impossible, or even improbable. Such presumption would be radical. Inter-state and inter-district travel and communication is so constant and universal, that to make such a presumption would be well nigh irrational. To include *the venue* in the presumption of the Act is to conclude that *"purchase"* and *"possession"* is one and the same thing. That possession of any amount in any District means an *unlawful purchase* of it in the same District. We submit that such a conclusion is untenable in any criminal case. The conclusion reached by the Circuit Court of Appeals on this point in opposition to the Seventh and Eighth Circuits should be reversed.

> "There was no such connection between the fact of possession of morphine in one district and the fact of purchase of it in the same district as to make former prima facie evidence of latter, inasmuch as common experience does not support such presumption."

Brightman v. U. S. 7 Fed. (2d) 532.

"This is not a case of admitted possession of the drug from which inferences and presumptions under the statute might be drawn. Possession was denied." *Hood v. U. S.* 14 F. (2d) 925.

The venue is jurisdictional in every criminal case. It cannot be waived. *Wharton Crim.* Ev. Cec. 106a. *Vernon v. U. S.* 146 Fed. 121: *Moran v. U. S.* 264 Fed. 768: *Underwood v. U. S.* 267 Fed. 412: *Tuckerman v. U. S.* 291 Fed. 958-67.

This question is further discussed at pages 12 to 14 of our brief in support of the Petition for the Writ of Certiorari.

POSSESSION NO VIOLATION OF ACT

Since the Government now concedes, however, that Petitioner was not required to register, and Count II is out of the case, then it must also be conceded that mere possession of 3.4 grains of morphine, even if admitted by petitioner, would not constitute a violation of the Act, whether the venue is included or not. Possession of 3.4 grains of morphine by one not required to register, is not prima facie evidence of a violation of the Act. The presumption is made only against dealers who are required to register and pay the special tax. It being now conceded that defendant is not such a person, an unlawful purchase cannot be presumed against him even if he possessed the small amount of morphine charged in Count I. This Court has so held.

THE CASES

In *United States v. Jin Fuey Moy*, 241 U. S. 864: 60 L. Ed. 1061, it is held:

> "The words 'any person not registered' in §8 of the Opium Registration Act of 1914, do not mean any person in the United States, but refer to the class dealt with by the statute—those required to register—and one not in that class is not subject to the penalties prescribed by the statute."

It was properly argued in the briefs in that case, that:

> "Acts of Congress must be construed to avoid absurdities. The Harrison Drug Act *does not apply to mere consumers or possessors.*"
>
> "It is a revenue act, and in so far as it is, it does not violate the Constitution, but to construe said act as a police regulation to suppress the traffic in opium and other drugs, within the several States, would be to render it unconstitutional."

To escape an absurd conclusion concerning the Act, in the opinion this Court said:

> "Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost, if not quite, to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima*

facie criminal and subject to the serious punishment made possible by §9."

Again in *Linder v. United States,* 268 U. S. 5: 45 S. C. R. 446: 69 L. Ed. 809, it is held:

> "The mere possession of morphine or cocaine creates no presumption of guilty violation of the Harrison Anti-Narcotic Law as against persons not required to register by section 1 of such act."

In the opinion it is said:

> "Further, grave constitutional doubts concerning section 8 cannot be avoided unless limited to persons who are required to register by section 1. *Mere possession of the drug creates no presumption of guilt as against any other person."* (Italics ours)

This has also been the uniform ruling in the lower Federal courts. See, *Johnson v. U. S.* 294 F. 753; *Lewis v. U. S.* 295 F. 678; *Hampton v. Wong Ging,* 299 F. 289, where it is said:

> "Whether or not the offense of which the appellees were convicted involved moral turpitude is not disclosed by the record. It informs us only that the appellees were each convicted of *having opium in his possession.* If this was the sum total of their offense against the laws of the United States, *they were innocent of violation of law."*

In *Lamento v. U. S.* 4 F. (2d) 901, it is held:

> "Possession by an addict or consumer, who is not a retailer or distributor, *in moderate*

> *quantities,* such as a consumer or addict might naturally have for his use, is not presumptive evidence of violation of section 8 or section 1."

It would seem unnecessary to say more. Defendant did not plead guilty to the charge of *purchasing* morphine. He denied that he ever *possessed* any. He was *presumed guilty of purchasing* because it was alleged that he *possessed* an insignificant amount. Yet possession of 3.4 grains by one who is not a dealer in stamped drugs, is no crime, and there can be no presumption of an *unlawful purchase,* either under the Act, or the adjudicated cases, even if possession was admitted.

It is admitted that the conviction under Count II cannot stand. Conviction under Count I is even more vulnerable, if that is possible. The Count does not charge, "plainly and unmistakably," any violation of the Harrison Act. There was no proof of a purchase to enlarge the charge or take it out of the *proviso* in paragraph 12. No conviction should stand without evidence to support the charge made. No indictment can prove itself. The judgment should be reversed.

NO POSSESSION

It would seem what has already been said calls for a reversal of the lower courts, yet, in the brief supporting our Petition for the Writ, (p. 17) we said:

> "We expect the writ will issue to settle these conflicting decisions in the different circuits, and shall then point out the insufficiency and absurdity of the evidence in support of Count II."

We did not then expect an admission by the Government that the conviction under Count II, should not be sustained. Yet it appears necessary to discuss the evidence in support of Count II, not now for the sake of Count II, but because of the indirect bearing it has on the alleged purchase of 3.4 grains in Count I. Defendant's possession is presumed because it is claimed he handed to the Nelson woman some laundry which was supposed to contain the 3.4 grains. From this claimed, or presumed, possession it is maintained that the statutory presumption of *an unlawful purchase*, may be drawn without other or further proof. With such view in mind, we deem it advisable to review the evidence, or lack of evidence, which bears indirectly on *possession.*

EVIDENCE

No matter how minutely the record may be scanned, little or no evidence can be found to identify the 3.4 grains of morphine. There can be no serious contention that any other amount was identified.

The prosecution claimed that on the morning of December 31, 1925, defendant made promises to ob-

tain morphine for two alleged addicts in the King County Jail. They testified as to what he said. It is not denied that a stenographic report was made and suppressed. They did not call Nelson, one of the alleged addicts. He was kept in jail until after the trial, and defendant was not permitted to either see him or call him as a witness. A felony charge for forging narcotic prescriptions was hanging over Cicero, the stool pigeon addict. (R. 33.) He was never tried, but at the time was under the complete domination of Narcotic Agent Patterson, who placed $20.00 to his credit to entrap defendant. (R. 57) He testified:

> "I was in jail on December 29th, and sent a message for Mr. Casey to come and see me. I knew at the time there was $20.00 deposited to my credit in the jail. Casey came December 31st. I told him I was sick, and asked him if he had anything for me. *He said he didn't have anything with him,* and explained *he did not want to change places with me.* I asked him to send me some morphine in a bath towel or laundry. *At the time I was not using narcotics.* (R. 30-1)

One, Hawkins, testified for plaintiff:

> "I was head trusty in the King County Jail. I didn't deliver packages to the prisoners without their going through the jailer's hands. He opened and examined the mail. It was against the rules to deliver any package to anybody, even an envelope, without

the jailer seeing it. It was against the rules for a lawyer or anyone else to deliver to the prisoners anything without the jailer's consent and knowledge. They have a large sign up in the jail publishing that fact, and if anyone did that, they would be forbidden the right to come to the jail. All I know about this is that on the 19th of December (not the 31st) a package came through for Wilson. I deliver the package after they have examined it. The jailer called me to his office and said, 'Take this to Wilson.' I did not see the party who delivered to the jail the package I took to Wilson." (R. 46-7)

Allen Stark testified for plaintiff:

"I was jailer at the King County Jail in December, 1925. Most of defendant's clients were narcotics. After he visited some of these prisoners, I had noticed that the same prisoners were under the influence of narcotics . . .

I have never searched any particular prisoner after Mr. Casey had visited them, but after he left *I suspicioned* he had given them narcotics. There would be other people visiting the jail about the same time, and there would be numerous packages coming up all day long. He was not the only lawyer who visited narcotic addicts. He has a very small percentage of the addict cases.

On December 19th, coming from Mr. Casey, I really do not know of anything personally." (R. 24-9)

Gerald V. Close testified for plaintiff:

> "That he was a Federal narcotic officer. . . . As to the conversation between Casey and Cicero and Nelson, it would not have been necessary to have the dictaphone to hear it . . . The conversation was in the normal tone of voice right straight along . . . When we searched Casey's office, we did not find any narcotics or any trace of them." (R. 34-8-9)

Albert D. Martin testified for defendant:

> "That he had been practicing law for 26 years, and had defended a great many prisoners. That he had often visited the King County Jail for many years. That attorneys were not allowed to come in personal contact with the prisoners except in the jail office. That it would be impossible to give any packages to the prisoners, as the screen separating the attorneys from prisoners is so fine that you could not put a match through it." (R. 64)

Defendant testified further: (See Petition, p. 5):

> "I heard George Cicero's testimony about Wilson and never made such a proposition at any time. I never sent, or caused to be sent, any narcotics to Wilson on the 19th of December, 1925, or at any other time . . . *I never represented Wilson.* Cicero gave me $25.00 as a part of a fee. His mother first came to me in the City Building at 5th and Yesler. I was going to see another client. Cicero had been taking orders for Christmas

> trees, and I helped the old lady to get the orders straightened out. She asked who I was and I handed her my card. Later Cicero sent for me." (R. 74-5)

The foregoing contains all the *material* testimony concerned with other narcotics than the alleged 3.4 grains, which we will advert to later. No other narcotics was mentioned by any witness. Stark's *suspicion* is not testimony. He had a reason for his suspicion. He was let out shortly after the trial in this case. It became public that he insisted on attorneys who did business at the jail, paying him a part of their fees. Defendant refused to do that. Hence, Stark readily became a partisan against him. Defendant could not deny what Stark *claimed* to be *his suspicions.* They were not the statement of facts, even if honest. But they were not honest. He could arbitrarily stop defendant from visiting the jail, and would have done so if he had actually entertained such suspicions. There is not a single kernel of fact in all this chaff of insinuations, innuendoes, and suspicions, identifying other narcotics than the 3.4 grains. No court can dignify what was said as the statement of a fact, showing that defendant deprived the Government of any of its revenue. There is no justification for asserting that there was "ample proof of sale not from or in a stamped package."

THE 3.4 GRAINS

The Government's testimony tending to show that defendant possessed the alleged 3.4 grains of morphine is contradictory. The theory was that defendant ironed this small amount into a towel preparatory to bringing it to Roy Nelson in the jail, and that Mrs. Nelson happened into his office at just the right time to take it to the jail for him. It is possibly true that there was some morphine in the laundry. There was a purpose in claiming it was there. Yet, the testimony on that point is also very unsatisfactory.

Close testified that Exhibit 11 was a bath towel which he and Patterson turned over to the City Chemist to be analyzed. That "14" was the morphine extracted from the towel by the City Chemist. (R. 37-8). Hofflan and Ballaine claim that they, not the City Chemist, made the test. Not a quantitative, just a qualitative. That "12" was a bottle containing the aqua solution—morphine sulphate. (R. 50-2). The City Chemist, Jacobson, did not test the towel—"11" at all. He extracted nothing from it. He merely analyzed the contents of "12", which was given to him, and found 3.4 grains of morphine hydrochloride in the bottle, not in the towel. He contradicts the others. He says Patterson turned 14 and 15 over to him, not "11". (R. 58).

All the witnesses, except Patterson, admit they knew nothing of where the laundry came from, only what Mrs. Nelson told them. It also appears certain that Mrs. Nelson brought the laundry to defendant's office. The immutable written evidence, *in green ink,* used in the narcotic office—"F. B. Nelson 1:45, December 31, 1925", is signed on the Government's own Exhibit 10. She signed her name on it with the time she received it from Patterson. She said she *first* went to defendants' office 45 minutes later—at 2:30, and could not get in. Why was she so persistent in going back 20 minutes later? (R. 44). Because she was carrying out the orders which had been given her to entrap Casey into bringing that package to the jail and get caught in the act. When he refused, what did she do? She answered that question: *"I took it BACK up to the narcotic office."* (R. 43). She would not have made this slip of the tongue, and said she took it BACK, if she was not conscious of getting it there at 1:45. She could not wholly avoid telling the truth though they had five months between the arrest and the trial to fix up the details of this story.

But what kind of a character was this woman? It is often insignificant things that confound the perjurer. She said she was married to Fred Nelson four years; was never married before; and had never lived in Ballard. The public records

show she was married twice before, (R. 88), that she had sued her second husband for a divorce, which had not yet been tried, and was then living with Nelson in adultery. (R. 43, 48.) That she had lived four places in Ballard where she was engaged in bootlegging. (R. 86).

It was solely on the testimony of this woman that the Government relied to show that defendant *possessed* the 3.4 grains of morphine. The defendant with two witnesses, the mothers of several children, testified to the contrary. But more than that—Exhibit 10, in her hand writing and signature—gave her the lie. The Government should be bound by its own exhibit. Mrs. Knight testified:

> "I have seen Mrs. Nelson here in the court room. I have an office with Mr. Casey. I went there about 2:00 P. M. on December 31, 1925. Mrs. Traynor was waiting to see me. While we were there, a large, fleshy lady came to see Mr. Casey. She went directly into his office. She had a package in her hand. Exhibit 10 looks like the color of it. She said, 'I am Roy's sister-in-law, Mrs. Fred Nelson. I have a package here I would like to have you take up to the jail for Roy. : : Roy is in terrible shape.' Mr. Casey said, 'If he is in that bad shape get a doctor and he will relieve his condition.' She went out with the same package still in her possession." (R. 68-70) Mrs.

Traynor corroborated this testimony. (R. 71-2).

It may be argued that the jury passed upon the evidence, and that this court will not go into the facts. Yet, when necessary, this Court does pass upon the facts. It is necessary in this case, because, aside from all other questions, this High Court must now say, once and for all, whether or not the evidence in this case shows that defendant *purchased,* or had such possession of morphine that it may be safely assumed that he did purchase, 3.4 grains of morphine in the Seattle District contrary to law, and not within the Proviso exception.

> "Even in the absence of a motion to instruct the jury to find for the defendant this court may examine the question where it is plain that error has been committed."
>
> *Clyatt v. U. S.* 197, *U. S.* 207.

> "Where a plain error has been committed in a matter vital to defendants, this court is at liberty to correct it, although the question may not be properly raised; and, . although no exception was taken."
>
> *Wiborg v. U. S.* 163, *U. S.* 633.

JUROR—WITNESS

This Court also examines the facts when they are insufficient in law, or it is self-evident that an accused person has not had a fair trial. Eight of

the jurors voted on the first ballot for defendant's acquittal in spite of the fact that they were turned loose every night for a week and surrounded by a swarm of narcotic agents. Five of the jurors made affidavits that one of their number told the others that he knew defendant's handwriting from private sources and that they could take his word for it that defendant wrote the disputed words "Roy Nelson, King Couinty Jail" on Exhibit 10, as Mrs. Nelson had testified, and contrary to what defendant testified. (R. 86-9)

In *Deery v. Cray*, 72 *U. S.* 5 *Wall.* 795: 18 L. *Ed.* 653, this Court said:

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, *it must appear so clear as to be beyond doubt* that the error *did not and could not* have prejudiced the party's rights."

It was misconduct of the juror. He had no right to convince either himself or the other jurors from private sources, and information not known to the others. The Circuit Court of Appeals said this could not have *greatly* influenced the jury. But if they were influenced at all, a new trial should have been granted. When a verdict is tainted it should be set aside on the court's own motion. The jurors

swore that they were influenced. That should be sufficient. Theretofore eight of them were for acquittal. Thereafter defendant was convicted without being confronted face to face with the juror-witness. It was not discretionary, the verdict should have been set aside.

See, *Mattox v. U. S.* 146 *U. S.* 140: 36 *L. Ed.* 917 *State v. Lorenzy,* 59 *Wash.* 308: 109 *Pac.* 1046. *State v. McChesney,* 114 *Wash.* 113: 194 *Pac.* 551.

CASE ABSURD

The term "frame-up", may be threadbare, but this case has every ear mark of being nothing else. It has not been denied that the Nelson woman said: "she would kill Casey." (R. 85), and that this case was a frame-up. (R. 87.) Patterson said: "Casey double-crossed me and I will get him for it." (R. 61.) One dose of morphine for an addict is from 6 to 40 grains. (R. 83.) The average does is 15 grains.

> "Morphine users consume an average of 15 grains daily. Cases are known where 45 to 70 grains have been injected daily."
>
> War on Opium by Anti-Opium Association.

No man, unless a complete idiot, would involve his liberty by trying to smuggle through a strange woman, 3.4 grains to an addict in jail. It would aggravate and anger the addict rather than satisfy him. His craving for the drug would become more

acute. Then again, if defendant actually meant to send or bring morphine to the addicts in jail on December 31, 1925, why was the Nelson woman sent to assist him? It was because they knew he was not going to do so, that they sent the Nelson woman to entice him into it. If she was smart enough to "bootleg" for years and not get caught, she might be smart enough to bait defendant into that trap. When she failed, then the story had to be changed. Standing alone without contradiction the woman's testimony is incredible. The evidence of defendant with his two witnesses, and Government Exhibit 10, which supports them, should be accepted. There is no credible testimony to show that defendant ever possessed the 3.4 grains of morphine. The statutory presumption of an unlawful purchase cannot be legitimately drawn, because there is no believable proof of possession.

> "Such a mode of arriving at a conclusion of law is generally, if not universally, inadmissable. No inference of fact or of law is reliably drawn from premises which are uncertain."
>
> *U. S. v. Ross,* 92 U. S. 281-3: 23 *L. Ed.* 707.
>
> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."
>
> *C. M. & St. P. Ry. v. Coogan,* 271 *U. S.* 472: 70 *L. Ed.* 1041.

In the instant case, there is no legitimate or believable evidence of possession, upon which to presume a purchase, either lawful or unlawful. It is the God's truth that defendant never possessed a single grain of morphine in his life.

HARRISON ACT UNCONSTITUTIONAL

At page 18 of the brief supporting our Petition for the Writ, we briefly argued that the Harrison Act is unconstitutional. We desire at this time to enlarge some on that point. We realize that this Court naturally hesitates to declare invalid, any law passed by Congress. It was well expressed as "a painful duty", by the great Marshall. But the powers of Congress are wisely limited. It was never intended that the National Government should usurp the ordinary Police powers reserved to the States. The suppression of crime is one of the State's powers, Section 4071-3 Laws of 1923 of the State of Washington provide severe penaltics for traffic in narcotics. Unless carefully guarded and regulated, moral standards may easily be violated in the purchase or sale of narcotics. While Congress has the right to raise revenue by a tax on the commercial movement of narcotics, the same as on tobacco and many other things, it has no right to punish a citizen because he violated the moral law in his use of narcotics. That belongs to the Police Power of the States. If the object of the Harrison Act is to raise revenue, and inci-

dentally impose normal penalties for the non-payment of the taxes imposed, it is constitutional. If, however, the covert object is to inflict punishment for the immoral traffic in drugs, and only incidentally collect a tax, then the Act is unconstitutional, and this Court should no longer hesitate to so declare. In the *Linder case,* 268 *U. S.* 5: 69 *L. Ed.* 809, in a comprehensive opinion, it is made plain that Congress cannot make it a crime to sell or distribute narcotics no matter how immoral or detrimental to the public welfare such traffic may be. It has a right to levy a tax for obtaining revenue, but it may do no more. If Congress passed the law, not for the purpose of raising revenue—even though it may yield considerable—but to regulate or prohibit the sale of narcotics by imposing severe penalties, then the Act is unconstitutional.

We submit that the chief object of the Harrison Act was not to pass a revenue measure. It was conceded by the Government in the *Jin Fuey Moy* case, 241 *U. S.* 394, that it was passed for the purpose of carrying out the recommendations of the International Opium Convention. Hence the chief object of Congress was, *not to raise revenue,* but *to stamp out what was regarded as a nefarious traffic.* But however laudable the purpose, Congress has no right under our dual system of government, to prohibit the purchase or sale of drugs. Prior to the Eighteenth Amendment, it had no

power to regulate the sale of liquor except on reservations or on other Governmental territory. It might raise revenue on liquor as it did, but it had no right to prohibit the traffic. The constitutionality of the Harrison Act is not directly passed on in the Jin Fuey Moy case. In the *Doremus* case, 249 *U. S.* 86, the Act is upheld by a divided court, but on the sole ground of being a revenue measure. The majority opinion loses sight of the fundamenatol rule so ably pronounced in later cases by the present Chief Justice, that the Court will look to the *purpose* and *intent* of Congress in the enactment of a law, and determine whether its *primary* purpose was to impose a tax, with incidental restraint on the business of occupation, or whether its *real* purpose was to regulate or prohibit something beyond the power of Congress to control. It seems unnecessary to go farther than to quote the learned Chief Justice in the famous *Child Labor Tax* Case, 259 *U. S.* 20: 66 *L. Ed.* 817:

> "We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does the law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? or does it regulate by the use of the so-called tax as a penalty?"

After pointing out that the law provided heavy burdens and penalties for its violation—as the Harrison Act does—and that a court "must be blind not to see that the so-called tax is imposed to stop employment within the age limits prescribed", then adds:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress dealing with subjects not entrusted to Congress but left or committed by the Supreme Law of the land to the control of the States. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the Ark of our Covenant, or the harm which will come from breaking down recognized standards."

The logic of this great opinion must be departed from, to uphold the Harrison Act as constitutional. While one Justice dissented, the opinion could not be answered, and the Justice wisely refrained from trying.

In *U. S. v. Daugherty*, 269 *U. S.* 360: 70 *L. Ed.* 309, (Our brief p. 18), Justice McReynolds cites this case, with *Hammer v. Dagenhart*, 247 *U. S.*

251. *Hill v. Wallace,* 259 *U. S.* 44, 67, and the *Linder* case, supra., and concludes that if the constitutionality of the Act is hereafter properly presented, may necessitate a review of the question. The question is now presented, and the principles enunciated in the Child Labor Tax Case should become the settled law of the Country regarding the Harrison Act. The soundness, lucidity, and logic of that opinion cannot be disregarded when the validity of any Congressional act is in question.

It is inconceivable that if Congress had intended the Harrison Act merely as a revenue measure, that it would have made the failure to pay $3.00 tax, a felony punishable by five years in the penitentiary, or the failure to pay *one cent* special tax on 3.4 grains of morphine, punishable by 14 months in the penitentiary, with disgrace and disfranchisement. As Judge Bourquin, an excellent constitutional lawyer, recently announced in a prosecution under the Harrison Act:

"If all persons who owed some tax under it should be imprisoned in the penitentiary, there would not be enough outside to act as keepers."

If by any view than can be imagined, defendant unlawfully purchased 3.4 grains of morphine, on which he failed to pay *one cent* special tax, is fourteen months in the penitentiary, only such: *"Incidental restraint* and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?"

There is only one sensible answer to this question. Congress exceeded its powers, and invaded the Police Power of the States, in the enactment of the Harrison Act the same as it did in the Child Labor Act. It should be likewise held unconstitutional.

Whether the law is condemned or not however, under a fair construction of the Act, no violation of it is alleged in the indictment, and none was proven at the trial. The judgments of the lower courts should be reversed and the action dismissed.

Respectfully submitted,

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Seattle, Washington

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals may be found at page 107 of the record. It has not yet been reported.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on June 27, 1927. (R. 114.) A petition for rehearing was filed and entertained, but denied on August 1, 1927. (R. 115.) The present petition was filed in this Court on September 1, 1927.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

Petitioner contends (1) that the statutory presumption of unlawful purchase of narcotics arising from the possession of unstamped drugs does not relieve the prosecution from establishing the venue of the purchase, and (2) that Count 2 of the indictment is fatally defective and the conviction thereunder not sustained because the indictment failed to charge and the proof failed to show that the petitioner was dealing in stamped drugs, it being his contention that a dealer in unstamped drugs is not required to register as a dealer and pay the special tax.

STATEMENT

The petitioner was convicted in the United States District Court for the Western District of Washington under an indictment in two counts. (R. 4.) He was sentenced to serve 14 months on each count, the sentences to run concurrently (R. 10), so that if conviction under either count is free from reversible error the judgment below must stand. Under Count 1 (R. 2) petitioner was charged with having purchased morphine not in or from an original stamped package. By Count 2 the charge was that he "did * * * manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away * * * morphine, without having registered and paid the special tax as required and imposed by law." There was no allegation in Count 2 that petitioner dealt in or dis-

pensed *stamped* drugs. The evidence tended to establish that the petitioner, a lawyer, visited prisoners in the King County Jail and received from them money with which he ultimately supplied them clandestinely with narcotic drugs. Thus there was ample proof of sale not from or in a stamped package, but Count 1 charged purchase, not sale. There was no proof of purchase, except proof of possession of unstamped drugs. To convict under Count 1 the United States was therefore obliged to rely on the presumption created by the statute that possession of unstamped drugs is *prima facie* evidence of unlawful purchase.

Under Count 2 there was no proof of importation, manufacture, or compounding drugs. The only evidence of dealing in drugs was that above mentioned, showing sales of drugs not in or from the original stamped package. Such proof of dealing in drugs as was produced showed dealing in unstamped drugs. No attack on the indictment was made until after verdict, when the insufficiency of the indictment was asserted in a motion in arrest of judgment. (R. 4.) The bill of exceptions shows that at the close of the evidence (R. 83) the "defendant challenged the sufficiency of the evidence and requested the court to instruct the jury to return a verdict of Not Guilty on Count 1 of the indictment." A similar request was made as to Count 2 (R. 84).

The assignments of error in the Circuit Court of Appeals (R. 13) include the refusal of the trial

court to direct the jury to find the defendant not guilty and its denial of the defendant's motion in arrest of judgment (R. 16).

PERTINENT STATUTES

Section 1 of the Harrison Narcotic Act of December 17, 1914 (c. 1, 38 Stat. 785), as amended by the Act of February 24, 1919 (c. 18, 40 Stat. 1057, 1130), U. S. C. Title 26, Section 211, provides, among things:

> That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided * * *.

It then provides a tax of $24 per annum on importers, manufacturers, producers, or compounders; $12 per annum on wholesale dealers; $6 per annum on retail dealers; and $3 per annum on physicians and other practitioners entitled to administer drugs in the course of professional practice.

It then defines importers, manufacturers, and dealers as follows:

> Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs

shall be deemed to be an importer, manufacturer, or producer.

Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer * * *.

The section then provides:

It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

There is then found in Section 1 the following provision:

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required

by this section shall be prima facie evidence of liability to such special tax * * *.

ARGUMENT

It will be noted that while the law requires every person who imports or compounds drugs to register and pay the importer's or manufacturer's special tax, the only dealers who are required by the Act to register and pay the special tax are those who sell or offer for sale any of the drugs in the original stamped package.

Count 2 of the indictment did not allege that the drugs which the petitioner was charged with having manufactured, sold, and dealt in were in or from the original stamped packages. In so far as it charged manufacture or production, the indictment was good, because, for obvious reasons, the law does not require that a manufacturer or importer must manufacture or import *stamped* drugs to become liable to the special occupation tax. In so far as Count 2 of the indictment charged sale and dealing in drugs, it may have been insufficient as against a timely attack, because it did not allege that the drugs dealt in were in or from the original stamped packages, and Count 2 charged only the failure to pay the special occupation tax, which is only required from dealers who deal in drugs in or from the original stamped package. While Count 2 of the indictment was probably good as against an attack first made by motion in arrest of judgment, we find the evidence failed to show any

manufacturing or importing and showed only dealing in drugs from or in unstamped packages. The evidence thus failed to show that the petitioner was a person required to pay a dealer's special tax.

The Circuit Courts of Appeals of the Sixth and Eighth Circuits have held that one dealing in drugs not from the original stamped packages is not required by the Act to pay the special tax. *Weaver* v. *United States,* 15 F. (2d) 38; *O'Neill* v. *United States,* 19 F. (2d) 322. We see no reason to doubt the soundness of these decisions. The terms of the statute are explicit in saying that dealers in or from the original stamped packages are those who must pay the special occupation tax.

The Circuit Court of Appeals in the case at bar does not discuss this problem, but disposes of the second count by the following statement (R. 110):

> Upon the second count the evidence, though conflicting, is ample to support the verdict.

We do not feel justified, therefore, in resisting the petition for certiorari on the ground that the conviction under Count 2 of the indictment was proper. It remains to consider whether that under Count 1 may be sustained.

The single point under Count 1 is whether the proof showed the offense to have been committed within the district. The charge was purchase of drugs not in or from stamped packages. The proof showed sales not in or from stamped packages, and therefore showed possession. To sustain the charge of purchase the United States was obliged to rely

on the presumption created by that provision of the statute to the effect that—

> the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.

Proof of possession of unstamped drugs, therefore, was sufficient to raise the presumption of purchase, but the question is whether the presumption is not only as to the fact of purchase, but as to the place of purchase so as to support the venue.

The Circuit Court of Appeals for the Eighth Circuit, in *Brightman* v. *United States,* 7 F. (2d) 532, and in *Cain* v. *United States,* 12 F. (2d) 580, and the Circuit Court of Appeals for the Seventh Circuit in *DeMoss* v. *United States,* 14 F. (2d) 1021, have held that the presumption arising from the possession of untax-paid narcotic drugs does not extend to the place of purchase.

In the present case the Circuit Court of Appeals for the Ninth Circuit has held the other way. It said (R. 110):

> While defendant's contention is not without support in the decided cases * * *, to grant it would seem to rob the statute of all efficacy. If independently of the statutory presumption, the Government must affirmatively prove the place of purchase, it must also by like evidence prove the substantive fact of purchase, for how the place of purchase can be established without at

> the same time proving the purchase, is not apparent. Fairly construed, the statute in our opinion extends the presumption to the incidental matter of place as well as the substantive matter of purchase.

While the court has advanced persuasive reasons in support of its conclusion on this point, since it is in direct conflict with the decisions of Circuit Courts of Appeals in two other circuits it is a proper case for the issuance of the writ of certiorari to settle the conflict.

We are not disposed to press any contention that the questions involved were not sufficiently raised below.

Since we have concluded that the conviction under Count 2 may not be sustained and that in respect of the conviction under Count 1 a question is raised on which there is a conflict of decisions, we see no ground for opposing the issuance of the writ.

Respectfully submitted.

WILLIAM D. MITCHELL,
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O. R. LUHRING,
Assistant Attorney General.

HARRY S. RIDGELY,
Attorney.

SEPTEMBER, 1927.

U. S. GOVERNMENT PRINTING OFFICE: 1927

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 500

THOMAS J. CASEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

The petitioner's brief, filed January 5, 1928, was served after the brief for the United States had been sent to the printer, and it raises points not dealt with in the brief for the United States.

I. The petitioner contends that Count 1 of the indictment doeos not charge an offense because, although it charges petitioner with unlawfully purchasing morphine not in or from a stamped package it fails to allege that the drug had not been obtained in pursuance of a bona fide medical prescription, and therefore fails to negative the exception contained in a proviso in Section 1.

The sufficiency of Count 1 was not questioned until after verdict, by motion in arrest (R. 4), and

the record does not disclose that this ground for attack on Count 1 was mentioned in the motion or even mentioned in the District Court. The opinion of the Circuit Court of Appeals does not mention the point. It states (R. 108):

> The sufficiency of the first count is not seriously challenged. One of the clauses is grammatically misplaced, but the meaning is so obvious that to quash upon that ground would be a pure legalism.

The briefs in the Circuit Court of Appeals show that there the attack on the sufficiency of Count 1 was because of the misplacing of a clause, mentioned in the opinion below. That point was that the clause "not in the original stamped package," etc., was so placed as to mean that the accused was not in a stamped package.

The point that Count 1 should have alleged that the drug was not purchased in pursuance of a prescription was first mentioned on the application for certiorari.

The evidence was ample to show that the drugs which the petitioner was selling and delivering to prisoners in the jail had not been obtained by him on a bona fide medical prescription.

The point is without merit. Section 8 refers to offenses under Section 1 of the Act and to the exception of the case of drugs obtained on medical prescription and then provides:

> That it shall not be necessary to negative any of the aforesaid exemptions in any com-

plaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.

See *Watson* v. *United States,* 16 F. (2d) 52, 54; *Nelson* v. *United States,* 298 Fed. 93, 94; *Newman* v. *United States,* 299 Fed. 128.

II. The petitioner also contends that the conviction under Count 1 of the offense of purchasing morphine not in or from a stamped package should not be sustained because it rests on proof of possession and that the statute does not make possession by one not a registered dealer prima facie evidence of unlawful purchase of unstamped drugs.

The provision in Section 1, as amended, that "the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found" does not limit the presumption to the cases of those who are registered dealers.

So far as offenses against the stamp tax provisions are concerned, it makes no difference whether the offender is or is not registered. *United States* v. *Wong Sing,* 260 U. S. 18. *United States* v. *Jin Fuey Moy,* 241 U. S. 394, cited by petitioner, arose under the original Act before the stamp tax provisions were added, and it dealt with the substantive offense of possession without registration defined in Section 8. In *United States* v. *Wong Sing, supra,* the Court pointed out the distinction between the

Jin Fuey Moy case and a case involving unstamped drugs.

Count 1 does not charge the offense of possession, and the petitioner was not convicted of unlawful possession. The charge is purchase of drugs on which the stamp tax had not been paid, and possession of unstamped drugs only enters into the case as the basis for the statutory presumption that the drugs were unstamped when purchased. The case of *Linder* v. *United States,* 268 U. S. 5, arose under the order form provisions of Section 2 and does not deal with the stamp tax provisions.

III. The stamp tax provisions of Section 1, on which Count 1 was based, were sustained in *Alston* v. *United States,* 274 U. S. 289.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

O. R. LUHRING,
Assistant Attorney General.

HARRY S. RIDGELY,
Attorney.

JANUARY, 1928.

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 107) is reported in 20 F. (2d) 752.

JURISDICTION

The opinion of the Circuit Court of Appeals to be reviewed was entered June 27, 1927. (R. 114.) The petition for certiorari was filed September 1, 1927, and granted November 21, 1927 (R. 119), pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The principal question in this case is whether the provision in Section 1 of the Harrison Narcotic Act, to the effect that the absence of appropriate tax-paid stamps from the drugs shall be prima facie evidence of a violation of the section by the person in whose possession the same may have been found, should be construed not only to raise a presumption of the fact of unlawful purchase, but also that the place of purchase was in the district where the unstamped drugs are found in the possession of the accused.

THE STATUTE

Section 1 of the Harrison Narcotic Act of December 17, 1914 (c. 1, 38 Stat. 785), as amended by the Act of February 24, 1919 (c. 18, 40 Stat. 1057, 1130), U. S. C. Title 26, Section 211, provides, among things:

> That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided * * *.

It then provides a tax of $24 per annum on importers, manufacturers, producers, or compound-

ers; $12 per annum on wholesale dealers; $6 per annum on retail dealers; and $3 per annum on physicians and other practitioners entitled to administer drugs in the course of professional practice.

It then defines importers, manufacturers, and dealers as follows:

> Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.
>
> Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.
>
> Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer * * *.

The section then provides:

> It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

There is then found in Section 1 the following provision:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the

aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax * * *.

STATEMENT

The petitioner was convicted in the United States District Court for the Western District of Washington under an indictment in two counts. (R. 4.) He was sentenced to serve 14 months on each count, the sentences to run concurrently (R. 10), so that if conviction on either count is free from reversible error the judgment must stand. On writ of error the Circuit Court of Appeals sustained the conviction on both counts.

Under count 1 (R. 2) the petitioner was charged with having *purchased* morphine not in or from an original stamped package.

In count 2 the charge was that he "did * * * manufacture, produce, compound, sell, deal in, dispense, distribute, administer, and give away * * * morphine, without having registered and paid the special tax as required and imposed by law."

There was no allegation in count 2 that the petitioner dealt in or dispensed *stamped* drugs.

The evidence tended to establish that the petitioner, a lawyer, residing in King County, in the State of Washington, visited prisoners in the King County Jail, and delivered to them clandestinely narcotic drugs for which they paid him, and that the drugs were sometimes delivered through the medium of handerkerchiefs or cloths which had been saturated with the fluid containing the drug and which the prisoners would soak in water in order to withdraw the drug.

There was ample proof of sale not from or in a stamped package, but count 1 charged purchase, not sale. There was no proof of purchase, except proof of possession of unstamped drugs. The evidence was sufficient to show that petitioner had possession of drugs during the course of the sale and delivery to the prisoners, and the manner of delivery sufficiently established that drugs in the petitioner's possession in King County, were not in stamped packages.

To convict under Count 1 the United States was therefore obliged to rely on the presumption created by the statute that possession of unstamped drugs is prima facie evidence of purchase of unstamped drugs.

On the question of the *place* of unlawful purchase, there was no direct evidence to cover the question of venue and show that the unlawful purchase had been made within the district. The pe-

titioner resided and practiced law in the district and conducted the operations in drugs disclosed by the evidence within the district, and there was nothing to suggest that he had, during the period of these transactions, been outside of the district within which the offense was alleged to have been committed, but unless the provision of the statute that possession of unstamped drugs is prima facie evidence of violation of the section is construed to mean that possession is evidence not only of the fact of unlawful purchase, but that the place of purchase is that in which the accused is found in possession, the proof was probably insufficient to show that the purchase had been made within the district. The bill of exceptions shows that at the close of the evidence (R. 83) the

> defendant challenged the sufficiency of the evidence and requested the court to instruct the jury to return a verdict of Not Guilty on Count 1 of the indictment,

and the failure to so direct a verdict on Count 1 was assigned as error in the Circuit Court of Appeals (R. 16). The bill of exceptions does not disclose that in making the motion for instructed verdict on Count 1 the petitioner mentioned the matter of venue, but the request was broad enough to cover the point. Express reference to venue first appears in the record in the motion for new trial. (R. 9.)

Under Count 2 there was no proof of importation, manufacture, or compounding of drugs. The

only evidence of dealing in drugs was that above mentioned, showing sales of drugs not in or from the original stamped package. Such proof of dealing in drugs as was produced showed dealing in unstamped drugs. No attack on Count 2 of the indictment was made until after verdict, when the insufficiency of the indictment was asserted in a motion for arrest of judgment. (R. 4.) At the close of the evidence a request for an instructed verdict was made as to Count 2 (R. 84), and the failure to grant it was assigned as error (R.13).

Petitioner's point about Count 2 is that the statute requires only those who sell or dispense from original stamped packages to register and pay the tax, and that as Count 2 did not allege, and there was no proof, that the petitioner was dealing in drugs in original stamped packages, the conviction under Count 2 for failing to register and pay the dealer's tax can not be sustained.

SUMMARY OF ARGUMENT

I. Count 2 of the indictment charged a failure to register and pay the tax as a dealer. The statute expressly provides that only those who sell or dispense the drugs from original stamped packages are dealers and required to pay the occupation tax. In this case there was no proof that the accused was dealing in stamped drugs. The evidence showed that he dealt in unstamped drugs, and the verdict of guilty under Count 1 was based on that fact.

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Under these conditions the conviction under Count 2 should not be sustained.

II. Count 1 charged purchase of drugs not in or from the original stamped package. Proof of purchase consisted in proof of possession of unstamped drugs, and under the statute possession of unstamped drugs is *prima facie* evidence of the fact of unlawful purchase. There was no proof of the place of unlawful purchase other than proof of the place of possession and the inference to be drawn therefrom. The statute, making possession of unstamped drugs *prima facie* evidence of purchase of unstamped drugs, should be construed to make possession within the district *prima facie* evidence not only of the fact of unlawful purchase, but that the place of unlawful purchase was where possession was had. Although the statute does not expressly state that possesion shall be *prima facie* evidence that the purchase took place where possession exists, the provision in the statute that possession is *prima facie* evidence of unlawful purchase would be completely nullified if it does not cover the question of venue. If the prosecution is required to prove the place of purchase, in doing so it would have to prove the fact of purchase, and the presumption created by the statute becomes a dead letter. The statute should therefore not be construed to destroy its own effectiveness.

Construed as here contended, the statute is not unconstitutional. There is as much rational connection between the fact of possession of unstamped

drugs and the ultimate fact presumed, where the ultimate fact is the place of purchase, as where it is the fact of purchase. There is nothing unreasonable in the presumption that the unlawful purchase has taken place in the district in which the accused is found in possession of the unstamped drugs.

ARGUMENT

I

THE CONVICTION UNDER COUNT 2 CAN NOT BE SUSTAINED

Under Count 2 the petitioner was charged with manufacturing, producing, dealing in and dispensing morphine without having registered and paid the special tax imposed by law. The tax referred to was the occupation tax on importers and dealers. The evidence fails to show any manufacturing or importing, and showed only dealings in drugs in or from unstamped packages. Indeed, the verdict of guilty under the first count determined that the transactions were in unstamped packages. The statute expressly provides that the dealer's tax shall be paid only by those who sell or dispense in or from original stamped packages. After providing, generally, that those who import, manufacture, deal in or dispense drugs shall pay the special taxes provided, the Act defines an importer as one "who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs." For obvious reasons, the law does

not require that an importer or manufacturer must import or manufacture stamped drugs to become liable to the special occupation tax, as the drugs are not stamped until they are imported or manufactured, but the definitions of wholesale and retail dealers are different in this respect. They provide that every person who sells or offers for sale any of said drugs in or from the original stamped packages, shall be deemed a wholesale or retail dealer, as the case may be, and the provision creating a presumption resulting from possession is that—

> the possession of any *original stamped package* containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax. (Italics ours.)

The terms of the statute are therefore explicit in providing that only those who sell in or from the original stamped packages must pay the special occupation tax. Since in this case the indictment did not allege and the proof did not show that the petitioner was dealing in drugs in or from stamped packages, a conviction under Count 2 can not be sustained.

The Circuit Court of Appeals does not mention this question in its opinion, but disposes of the second count by the statement (R. 110):

> Upon the second count the evidence, though conflicting, is ample to support the verdict.

The Circuit Courts of Appeals for the Sixth and Eighth Circuits have held that one dealing in drugs not in or from the original stamped packages is not required by the Act to pay the special tax. *Weaver* v. *United States,* 15 F. (2d) 38; *O'Neill* v. *United States,* 19 F. (2d) 322; *Butler* v. *United States,* 20 F. (2d) 570. We see no reason to doubt the soundness of these decisions.

The record shows that at the close of the evidence the petitioner requested the court to instruct the jury to return a verdict of "Not guilty" on count 2 (R. 84) for insufficiency of the evidence, and the point is covered by the assignments of error (R. 16).

II

THE STATUTE SHOULD BE CONSTRUED TO MAKE POSSESSION OF UNSTAMPED DRUGS PRIMA FACIE EVIDENCE OF THE PLACE AS WELL AS THE FACT OF UNLAWFUL PURCHASE, AND SO CONSTRUED IT IS NOT INVALID

With Count 2 furnishing no basis for sustaining the judgment, the consideration of Count 1 remains, and the single point under it is whether the proof showed that the offense was committed within the district. The charge in Count 1 was purchase of drugs not in or from stamped packages. The proof showed possession of drugs not in stamped packages. To sustain the charge of unlawful purchase the United States was obliged to rely upon the presumption created by that part of the statute to the effect that—

> the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be

> prima facie evidence of a violation of this section by the person in whose possession same may be found.

Proof of possession of unstamped drugs, therefore, was sufficient to raise the presumption of the fact of unlawful purchase, but the question is whether the presumption includes not only the fact of purchase but the place of purchase, so as to support the venue.

The Circuit Court of Appeals for the Eighth Circuit in *Brightman* v. *United States,* 7 F. (2d) 532, and in *Cain* v. *United States,* 12 F. (2d) 580, has held that the presumption arising from the possession of untax-paid narcotic drugs does not extend to the place of purchase, and that it is necessary for the prosecution to prove, without regard to the statutory presumption, the fact that the unlawful purchase took place within the district.

The Circuit Court of Appeals for the Seventh Circuit in *DeMoss* v. *United States,* 14 F. (2d) 1021, has followed the decision in the Eighth Circuit.

In the present case the Circuit Court of Appeals for the Ninth Circuit has held the other way. It said (R. 110):

> While defendant's contention is not without support in the decided cases * * *, to grant it would seem to rob the statute of all efficacy. If independently of the statutory presumption, the Government must affirmatively prove the place of purchase, it

> must also by like evidence prove the substantive fact of purchase, for how the place of purchase can be established without at the same time proving the purchase, is not apparent. Fairly construed, the statute in our opinion extends the presumption to the incidental matter of place as well as the substantive matter of purchase.

The question is one of statutory construction, and whether Congress meant that although possession of unstamped drugs is prima facie evidence of the fact of unlawful purchase it is nevertheless necessary for the prosecution to furnish proof beyond the fact of possession in the district that the unlawful purchase took place within the district. The statute does not expressly state that possession shall be prima facie evidence that the unlawful purchase took place where the possession occurred, but it is clear that the provision in the statute that possession is prima facie evidence of unlawful purchase would be completely nullified if it does not cover the question of place and venue. It would be a rare case where the prosecution could prove the place of an unlawful purchase without at the same time proving the fact of the unlawful purchase, and if the fact of purchase must be proved the statutory presumption is worthless. Although the statute is not fortunately worded, we invoke the rule that a statute should not be given a construction producing unreasonable results if it may be avoided. *United States* v. *Katz,* 271 U. S. 354.

The statute should not be construed to destroy its own effectiveness. It should be construed to mean that possession of unstamped drugs is prima facie evidence of the fact of unlawful purchase in the district where the possession is shown to have occurred.

So construed the statute is not unconstitutional. In *Mobile, etc., R. R.* v. *Turnipseed,* 219 U. S. 35 (43), it was said—

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.

A legislative presumption of one fact from evidence of another may properly relate to the place of the offense as well as to the fact of the offense, and in this respect the question of venue under the Sixth Amendment is not different from any other question of fact required to be established to convict. There is a rational connection between the fact of possession of unstamped drugs, presumed to have been unlawfully purchased, and the fact of purchase at or near the place where the possession is shown. The facts of the present case illustrate the reasonableness of this presumption. The peti-

tioner was a resident of King County, Washington, and conducted his business there and made frequent visits to persons in the King County Jail for the purpose of supplying them with drugs. There is no suggestion that he was in transit through the district or had been out of it, and if the fact of unlawful purchase of drugs is to be presumed from his possession within King County of unstamped drugs, it is not unreasonable to assume that he purchased the drugs in King County. That the fact presumed need not be one of inevitable inference from the fact proven is disclosed in *Yee Hem* v. *United States,* 268 U. S. 178, 185, where it was said—

> * * * If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. See *Dunlop* v. *United States,* 165 U. S. 486, 502–503; *Wilson* v. *United States,* 162 U. S. 613, 619. In the *Wilson* case the accused, charged with murder, was found, soon after the homicide, in possession of property that had belonged to the dead man. This court upheld a charge of the trial court to the effect that such possession required the accused to account for it, to show that as far as he was concerned the possession was innocent and honest, and that if not so accounted for it became "the foundation for a presumption of guilt against the defendant."

See also *O'Neill* v. *United States*, 19 F. (2d) 322, 328.

The venue point was sufficiently raised by motion to direct a verdict. While the record does not show that it was or was not mentioned expressly in pressing the motion it was called to the attention of the trial court in a motion for new trial.

If the statute be construed as is here contended for, there was sufficient evidence to sustain the conviction under Count 1 and the judgment should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
O. R. LUHRING,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

JANUARY, 1928.

○

narcotic purchase presumed from possession of drug - great extension of presumption to find accused guilty of crime - And not only purchase is presumed

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1927.

Thomas J. Casey, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 9, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner, Casey, was convicted upon two counts of an indictment, the first of which charged him with the purchase of three and four-tenths grains of morphine not in or from the original stamped package, at Seattle, within the jurisdiction of the Court. The conviction was sustained by the Circuit Court of Appeals. 20 F. (2d) 752. A writ of certiorari was granted by this Court.

Here the second count was admitted by the Government to be bad, so that the only matter to be considered is whether the conviction can be sustained upon the first. It is argued that the evidence is not enough.—Casey had practised law in Seattle for many years, had been in the habit of visiting King County jail and had defended prisoners addicted to the use of narcotics. There was evidence tending to show that on different occasions he had promised to furnish them with opiates and that in pursuance of such promises and for pay received by him he had given or sent to them preparations of morphine, concealed, it was said, by soaking towels or the like in a solution of the drug. If this evidence was believed it showed that Casey was in possession or control of what he sent and it safely may be inferred that he did not proclaim his illegal purpose by putting stamps upon the towels. But the charge is a purchase, not a sale. There was no testimony directly concerning the purchase and the Government relies in part at least upon the presumption of a violation of § 1 of the Act of December 17, 1914, c. 1, as amended by the Act of February 24, 1919, c. 18, § 1006;

40 Stat. 1037, 1130, 1131, that that section purports to create. (C. Title 26, § 692.)

The amended section makes the purchase, sale, &c., of opium and derivatives unlawful except in or from the original stamped package, and the absence of the required stamps from any of the said drugs 'shall be prima facie evidence of a violation of this section by the person in whose possession same may be found'. For the petitioner it was argued that the presumption thus created does not and, consistently with the Sixth Amendment to the Constitution, cannot extend so far as to show a purchase within the district and thus to bring the case within the jurisdiction of the trial Court. The Circuit Court of Appeals answered that the objection to the venue was not raised specifically below. The Court was asked to direct a verdict for the defendant on the ground that the evidence was not sufficient and elsewhere it has been held that such a request is enough to save the question, and that a presumption extended to the place of purchase could not be upheld. *Brightman* v. *United States,* 7 F. (2d) 532. *Cain* v. *United States,* 12 F. (2d) 580. *Hood* v. *United States,* 14 F. (2d) 925. *De Moss* v. *United States,* 14 F. (2d) 1021. But we are of opinion that upon the facts of this case the Court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle is strong, and it is reasonable to suppose that if attention had been called to the point the inference could have been made stronger still. But the effort of the defence did not stop at this detail but was to show that Casey had nothing to do with the business and was wholly innocent of the offence charged.

With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate fact presumed', *Luria* v. *United States,* 231 U. S. 9, 25; *Yee Hem* v. *United States,* 268 U. S. 178, 183. Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer* v. *United States,* 245 U. S. 559. The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, § 2494. It is consistent with all the constitutional pro-

tections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence, § 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law.—The petitioner cannot complain of the statute except as it affects him.

We do not feel at liberty to accept the suggestion that the Government induced the crime. A Court rarely can act with advantage of its own motion, and very rarely can be justified in giving judgment upon grounds that the record was not intended to present. Upon this record, it was testified and might have been found for the Government that after Casey's visits addicts were noticed by the jailers to be under the influence of narcotics and that on a previous occasion Casey for money had got morphine at the request of Cicero, the supposed stool pigeon. It does not appear expressly that this last was told to the jailer before the supposed plot to entrap Casey, but in view of the relation between the parties it was very likely—and had the matter been in issue very probably would have been proved. We do not think that we are entitled to assume the contrary. If known to the jailers there was very probable cause to believe Casey an habitual practitioner. His own language when he was on guard, admitting that he frequently had promised the drug to prisoners, the testimony as to what was said in his presence (to the effect that he was the man who supplied the boys with narcotics when they wanted it) and his language importing habit, (as, that he hadn't a thing with him today) all tend to the same conclusion. We hardly can assume that the jailers did not know the facts in order to convict them of a gross wrong, when we keep in mind that the case was tried and the record made up without this in mind. Furthermore Casey according to the story was in no way induced to commit the crime beyond the simple request of Cicero to which he seems to have acceded without hesitation and as a matter of course. According to the evidence he seems to have promised morphine to Nelson, who does not appear to have been in the supposed plot. We are not persuaded that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger. Whatever doubts we may feel

as to the truth of the testimony we are not at liberty to consider them on the only question before the Court. The grounds for uneasiness can be considered only by another power.

The statute is much more obviously a revenue measure now than when *United States* v. *Doremus*, 249 U. S. 86, was decided, and is said to produce a considerable return. *Alston* v. *United States*, 274 U. S. 289, 294. It is too late to attempt to overthrow the whole act on *Child Labor Tax Case*, 259 U. S. 20. It is said also that no opium is produced in the United States, and at all events the statute has been so modified that now at least *United States* v. *Jin Fuey Moy*, 241 U. S. 394, does not apply to this case. *United States* v. *Wong Sing*, 260 U. S. 18, 21. We pass as not needing discussion some minor points.

Judgment upon the first count affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1927.

Thomas J. Casey, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 9, 1928.]

Mr. Justice McReynolds.

I accept the views stated by Mr. Justice Butler. With clarity he points out the unreasonableness of the construction of the statute advocated by counsel for the United States. But I go further.

The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guaranties heretofore supposed to protect all against arbitrary conviction and punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.

Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry.

Probably most of those accelerated to prison under the present Act will be unfortunate addicts and their abettors; but even they live under the Constitution. And where will the next step take us?

When the Harrison Anti-Narcotic Law became effective probably some drug containing opium could have been found in a million or more households within the Union. Paregoric, laudanum, Dover's Powders, were common remedies. Did every man and woman who possessed one of these instantly become a presumptive criminal and liable to imprisonment unless he could explain to the satisfaction of a jury when and where he got the stuff? Certainly, I cannot assent to any such notion, and it seems worthwhile to say so.

Mr. Justice Butler concurs in these views.

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1927.

Thomas J. Casey, Petitioner, *vs.* The United States of America	On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 9, 1928.]

Mr. Justice Brandeis, dissenting.

The question presented is whether possession within the district of morphine not in the original stamped package is evidence sufficient to sustain the charge that it was illegally purchased therein. I have no occasion to consider that question. For, in my opinion, the prosecution must fail because officers of the Government instigated the commission of the alleged crime.

These are facts disclosed by the Government's evidence. In the Western District of Washington, Northern Division, prisoners awaiting trial for federal offences are commonly detained at King County Jail. The prisoners' lawyers frequently come there for consultation with clients. At the request of prisoners, the jailer telephones the lawyers to come for that purpose. A small compartment—called the attorneys' cage—is provided. Prior to the events here in question, the jailer had, upon such request, telephoned Casey, from time to time, to come to see prisoners accused of crimes other than violation of the Narcotic Act. He had doubtless telephoned also upon request of prisoners who were accused of these crimes. For Casey had acted as attorney in a number of narcotic cases. The jailer observed—or thought he did—that after Casey came, some of those visited were under the influence of narcotics. He suspected that Casey had brought them the drug. To entrap him, the following scheme was devised by Patterson and Close, federal narcotic officers, and carried out with the aid of George Cicero, a convicted felon and drug addict, then in the jail on a charge of forgery, and Mrs. Nelson, the alleged sister-in-law of Roy Nelson, another prisoner and drug addict.

On December 29th, Patterson and Close installed a dictaphone in the attorneys' cage and arranged so that, from an adjacent room, they could both hear conversations in the cage and see occupants. Then they deposited with the superintendent of the jail $20 to Cicero's credit; arranged with him to request the jailer to summon Casey to come to the jail; and also that, when Casey came, Cicero would ask him to procure some morphine and would pay him the $20 for that purpose. The jailer telephoned Casey as requested. Thereafter the federal agents were in waiting. Casey did not come until about 10 o'clock on the morning of the 31st. Cicero talked from the attorney's cage with Casey and gave him an order for the $20. By arrangement, Casey talked there also with Roy Nelson who gave him an order on the superintendent for $50. Both orders were immediately cashed. Mrs. Nelson talked with Casey in the corridor.

The testimony of Patterson, Close, Cicero and Mrs. Nelson, if believed, is sufficient to prove that Cicero and Roy Nelson asked Casey to procure morphine for them; that he agreed to do so; that the money paid was for that purpose; that it was arranged that the morphine should be smuggled into the jail in laundry; and that Mrs. Nelson arranged with Casey that she would call at his office in the afternoon. She did call, having first gone to the office of the narcotic agents and conferred with them. She testified that she saw at Casey's office a Chinaman or a Japanese; that Casey gave her the package for Roy Nelson; and that she took it immediately to the federal narcotic office. A federal narcotic agent who is a chemist testified that upon soaking one of the towels in the package brought to the office by Mrs. Nelson he found that it contained morphine.

I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commis-

sion. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. If Casey is guilty of the crime of purchasing 3.4 grains of morphine, on December 31st, as charged, it is because he yielded to the temptation presented by the officers. Their conduct is not a defence to him. For no officer of the Government has power to authorize the violation of an Act of Congress and no conduct of an officer can excuse the violation. But it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the Government of the officers' unauthorized and unjustifiable conduct.[1] Compare *Gambino* v. *United States,* 275 U. S. —.

This case is unlike those where a defendant confessedly intended to commit a crime and the Government having knowledge thereof merely presented the opportunity and set its decoy. So far as appears, the officers had, prior to the events on December 31st, no basis for a belief that Casey was violating the law, except that the jailer harbored a suspicion. Casey took the witness stand and submitted himself to cross-examination. He testified that he had "never bought, sold, given away or possessed a single grain of morphine or other opiate" and that he had "never procured, or suggested to anyone else to procure morphine or narcotics of any kind." He testified that the payments made on orders from Cicero and Roy Nelson were payments on account of services to be rendered as counsel for the defence in the prosecutions against them then pending. He denied every material fact testified to by witnesses for the prosecution and supported his oath by other evidence. The Government's witnesses admitted that the conversations in the attorneys' cage were carried on in the ordinary tone of voice; that there was no effort to lower the voice or to speak privately or secretly; and that they could have heard all that was said without the use of the dictaphone. They admitted that when the narcotic

[1]United States v. Adams, 59 Fed. 674; Woo Wai v. United States, 223 Fed. 412; Sam Yick v. United States, 240 Fed. 60, 65; Voves v. United States, 249 Fed. 191; Peterson v. United States, 255 Fed. 433; United States v. Lynch, 256 Fed. 674; Butts v. United States, 273 Fed. 35; United States v. Certain Quantities, etc., 290 Fed. 824; Newman v. United States, 299 Fed. 128; Capuano v. United States, 9 F. (2d) 41; Silk v. United States, 16 F. (2d) 568; Jarl v. United States, 19 F. (2d) 891; Cline v. United States, 20 F. (2d) 494. See also Di Salvo v. United States, 2 F. (2d) 222; United States v. Washington, 20 F. (2d) 160, 162. Compare Blaikie v. Linton, 18 Scot. L. R. 583.

agents searched Casey's office under a search warrant, on the evening of December 31st, they did not find any narcotics or any trace of them or any other incriminating article; and that when, at about the same time, they arrested Casey, he was taking supper with his wife and daughter at his home seven miles from Seattle. Whether the charge against Casey is true, we may not enquire. But if under such circumstances, the mere suspicion of the jailer could justify entrapment, little would be left of the doctrine.

The fact that no objection on the ground of entrapment was taken by the defendant, either below or in this Court, is without legal significance. This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts. In my opinion, the judgment should be vacated with direction to quash the indictment. Compare *United States* v. *Healy,* 202 Fed. 349, 350; *United States* v. *Echols,* 253 Fed. 862.

Mr. Justice BUTLER concurs in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1927.

Thomas J. Casey, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[April 9, 1928.]

Mr. Justice Sanford, dissenting.

I think that the case is not made out by the statutory provision as to *prima facie* evidence, and that the judgment should be reversed.

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1927.

Thomas J. Casey, Petitioner, *vs.* The United States of America. } On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[April 9, 1928.]

Mr. Justice Butler, dissenting.

The first count charges an unlawful purchase of 3.4 grains of morphine. The second charges unlawful sales. Defendant was convicted on both and sentenced to the penitentiary for fourteen months on each, the terms to run concurrently. The Circuit Court of Appeals affirmed the judgment on both counts. Here the Government rightly says that the conviction on the second count should not be sustained. This Court accepts that view and, as to that count petitioner is entitled to have the judgment reversed.

The indictment is under § 1 of the Harrison Narcotic Act of December 7, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, 40 Stat. 1057, 1130. It was enacted under Art. 1, § 8 of the Constitution granting to Congress power to lay and collect taxes. The words of the section under which the first count was found are:

> "It shall be unlawful for any person to purchase . . any of the aforesaid drugs except in . . or from the original stamped package . . ".

The essential substance of the first count follows:

> Thomas J. Casey on the 31st day of December 1925, at Seattle, Washington, did unlawfully purchase from a person unknown, and not in or from the original stamped package 3.4 grains of morphine.

By far the larger part of the testimony heard related to the second count and was not admissible to prove the purchase alleged in the first. That evidence can not fairly be brought forward now to sustain conviction on the first count.

Mere purchase or possession of morphine is not crime. Congress has not attempted, and has no power, to make either an offense. The gist of accusation is purchase of 3.4 grains of morphine that was not in or taken from a stamped package when delivered to defendant. That is the *corpus delicti.*

There was testimony sufficient to sustain a finding that defendant at the time and place specified, had possession of 3.4 grains of morphine. But there was no evidence to show how, when or where or from whom he got it. There is much difference between such a possession and the crime charged. A statutory provision is invoked in lieu of evidence to bridge this gap. It is found in the twelfth paragraph of the section; and, in order to show the immediate environment of the words relied on, the first three clauses of the paragraph are quoted.

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax:"

This section defines many offenses. They include purchasing, selling, dispensing, distributing, importing, manufacturing, producing, compounding, dealing in, administering and giving away of each of the numerous drugs mentioned in the section. The things forbidden are not alike. Some are essentially different from and inconsistent with the others. It can not reasonably be said that mere possession of 3.4 grains of morphine without a stamp thereon was sufficient to establish *prima facie* that defendant was guilty of all these crimes, or all that related to morphine or even to those respectively involving manufacture, sale and purchase of the 3.4 grains. There is no more reason to select one of these than there is to choose another for the application of the statutory rule of evidence.

The "absence of appropriate tax-paid stamps" cannot be said to make out dissimilar and inconsistent offenses. Tax-paid stamps

are significant to show payment of taxes and their absence under some circumstances properly may be evidence of non-payment. According to its words, the clause in question merely makes such absence "prima facie evidence of a violation of this section", the clause following makes possession of an original stamped package containing the drug by one not registered, evidence of liability for a tax. Fairly considered both clauses have to do with tax liability. The first to the tax on the drug, and the second to the tax imposed on importers, dealers, physicians, etc. That construction would be reasonable and would not stretch the law against those accused of the crimes created by the section.

And it is always to be remembered that this Act is to be construed as a measure to "lay and collect taxes". It has no other legal existence. The tax is one cent on each ounce or fractional part thereof. Defendant had 3.4 grains without a stamp on it. He is not accused of failure to pay a tax. The unlawful purchase charged is punishable by a fine of not more than $2,000 or by imprisonment of not more than five years or by both. U. S. C., Tit. 26, § 705. The only legal justification for such penalties is that they are calculated to aid collection of taxes. It is hard to continue to say that this Act is a taxing measure in order to sustain it. Eagerness to use federal law as a police measure to combat the opium habit—a purpose for which Congress has no power to legislate—should not lead to the enactment or the construction of laws that shock common sense.

And above all, the statutory rule of evidence should be construed having regard to the ancient and salutary doctrine known and rightly cherished as fair play by the people, the bar and the courts of this country, that every person on trial for crime is presumed to be innocent; and, that in order to convict him, the evidence must satisfy the jury beyond reasonable doubt that he is guilty of the crime charged. See *Coffin* v. *United States,* 156 U. S. 432, 453. *Cochrane and Sayre* v. *United States,* 157 U. S. 286, 298. *Davis* v. *United States,* 160 U. S. 469. The connection, if any, between the possession shown and the substance of the offense charged is too remote. Attention has not been called to any decision that goes so far. None can be found.

There is no evidence in the record that reasonably tends to show that defendant purchased the 3.4 grains of morphine or that, when purchased it was not in or taken from the original stamped package.

I am of opinion that the judgment should be reversed.